UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARGARITA DELGADO, et al., Plaintiff,	:	13-CV-4427 (NGG)(ST)
	:	August 29, 2017
V.	:	Brooklyn, New York
OCWEN LOAN SERVICING, LLC, et al., Defendant.	:	

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE STEVEN TISCIONE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: STEVEN WITTELS, ESQ.
J. BURKETT McINTURFF, ESQ.

For the Defendant: DAVID FIOCCOLA, ESQ.
CAMERON TEPFER, ESQ.
MATTHEW PREVIN, ESQ.
TIMOTHY OFAK, ESQ.
JASON McELROY, ESQ. .

Court Transcriber: ARIA SERVICES, INC.
c/o Elizabeth Barron
102 Sparrow Ridge Road
Carmel, NY 10512
(845) 260-1377

Proceedings recorded by electronic sound recording, transcript produced by transcription service

THE CLERK: Civil cause for motion hearing, 13-CV-4427, Delgado, et al. v. Ocwen Loan Servicing, LLC, et al.

Counsel, please state your appearances for the record.

MR. WITTELS: Steven Wittels for plaintiffs and the class. Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. McINTURFF: Burkett McInturff for plaintiffs and the class.

MR. FIOCCOLA: Good afternoon, your Honor. David Fioccola of Morrison & Forester on behalf defendant Cross Country.

MR. TEPFER: Cameron Tepfer on behalf of Cross Country. Good afternoon.

MR. OFAK: Timothy Ofak of Weiner Brodsky Kider for Cross Country Home Services, Incorporated and Sandra Finn.

MR. McELROY: Jason McElroy, Weiner Brodsky Kider, on behalf of Cross Country defendants.

MR. PREVIN: Matthew Previn at Buckley Sandler on behalf of Ocwen Loan Servicing.

THE CLERK: The Honorable Steven Tiscione presiding.

THE COURT: Good afternoon, everyone. Bear

with me a little bit. We just moved into this new courtroom and chambers today so things are a little bit of a mess.

MR. PREVIN: Congratulations.

THE COURT: As an initial matter, I got the materials that defendants were ordered to produce in camera. I have not had a chance to go through all of them yet. I got one courtesy copy of the binder. Does that have both sets of documents in it or just one set?

MR. OFAK: The courtesy copy of the binder should have documents with highlighting over the redacted portions.

THE COURT: Yep.

MR. OFAK: Sort of to make it easier, what we did is just kind of (ui) the submission.

THE COURT: As I said I haven't had a chance to look through all those materials yet, so that aspect of (ui) table that discussions until I have a chance to review all the materials.

The more pressing issues -- I still have no sense in talking with Judge Garaufis as to when there's going to be a decision on the motion to dismiss. I wish I could give you better guidance on that but as of now, I know just as much as you do. There's still the issue of the certification motion. Unfortunately,

things are kind of in limbo a little bit for those reasons and there's not much I or you can do about it at this point. We'll just have to make do with what we have.

So let's talk about some of the issues that the parties have raised more recently. I don't particular care where you want to start.

MR. McINTURFF: Well, your Honor, we believe we laid out all the issues in our letter, and I think that it encompasses -- will give us an opportunity to discuss the issues that the defendants raise. Our letter is document 349 filed yesterday. Your Honor has already dealt with the first item in our letter, which is the redactions motions, and then the second item is plaintiffs' motion for a protective order postponing the deposition of individual plaintiffs who have not been brought forward as class representatives. I think my colleague, Mr. Wittels, wanted to address the Court.

THE COURT: Technically speaking, we're obviously going to have to change that deadline since you're not going to get (ui) rest of discovery in the next three days. But what you're asking for is essentially a hold-off until two months before the end of discovery. I think we're kind of at that point, aren't we?

MR. WITTELS: I don't think so, Judge.

THE COURT: No? Okay.

MR. WITTELS: A) We'll get to it but we're going to -- we have other issues about group and their production. We have issues about documents that may have not -- in our number three item that weren't logged in terms of privilege properly, in our judgment, and post-lawsuit. Therefore, those documents might end up bringing forth documents we want to question people about. So we are not opposed to producing these plaintiffs at the appropriate time.

Just as a back story, we are producing Tuesday one of the class representatives who had been substituted in, Justin Mignusky (ph), so we are willing and able to produce the plaintiffs. He is coming into New York to make it easy for everybody but the other plaintiffs that I want to depose are not class representatives. One is a husband of one of the class representatives and your Honor should know that none of -- there was never any effort by the defendants to depose these people before they responded to the class motion. There is no sort of motion saying we need these depositions so that we can oppose --

THE COURT: Okay.

MR WITTELS: We are hearing that now. So

what we are just saying is we will produce them but what is the point now, before we have the class motion and the motion to dismiss decided. It's just not necessary.

THE COURT: Can't the same argument be made with respect to 90% of the outstanding discovery? I mean what is the purpose of going there if we just -- why don't we just wait and see how these motions come out? I mean, look, there are different ways you can approach discovery. We could have tabled a lot of this stuff until after the class certification motion was decided but nobody really wanted to do that.

MR. WITTELS: Because we did anticipate, you know, at some point -- obviously, we were going to have the trial, didn't happen. We want to be in a position, once the judge rules, to move forward. It's either going to be a class trial or it won't.

THE COURT: Okay.

MR. WITTELS: At some point.

THE COURT: But if it's not going to be a class trial, aren't these named plaintiffs? They might not be class representatives but they are named plaintiffs, right?

MR. WITTELS: Right.

THE COURT: So they have individual claims

against the defendants.

MR. WITTELS: Yes, true. It's just that a lot --

THE COURT: So they would have to need to be deposed. I mean, look, you're right. If certification is granted, then maybe they don't need to be deposed. But if certification is not granted, then obviously they need to be deposed since they are the individual plaintiffs for the remaining claims and, I don't know, the defendants may want to depose them anyway. I don't know what the purpose for that would be but if they choose to expend their resources deposing these people now, instead of waiting to see whether or not it is necessary, isn't that really their wasted time and effort?

MR. WITTELS: Well, it is not only their resources because we have a lot of -- in doing five plaintiffs -- with five plaintiffs all over the place, it's either we bring them in and pay for them, which has gone on -- if they want to pay to fly them in and put them up in New York, I mean, that it is a different story. They did say they would travel all over the place but apparently, you know, it took a lot of effort to produce, 23 is it, I think.

MR. McINTURFF: I stopped counting at 18.

MR. WITTELS: 23 plaintiffs, I think it was, that we have said in our motion. That is a big deal. As your Honor said, if we do get certified, they probably won't be deposed. I mean, it is unlikely that we are going to call everybody. If we call someone, certainly we will produce them before hand. We are not going to put up -- you know, you call twenty witnesses saying the same thing, you put the jury to bed.

THE COURT: I assume at this point you don't know who you are going to call.

MR. WITTELS: Right, we don't know. But I mean, it is likely it will be the people we put up as the class representatives, likely, I mean, if we get certified. So, I mean, we are just asking that it be held in advance. It is not something that really is necessary now, and Judge Levy and even Judge Garaufis had said -- when we were talking about who would be deposed, he said why -- he asked the defendants, why do you have to depose everyone? You don't, you know, -- I can decide class certification on a few plaintiffs. We ended up with 23. Judge Levy said, pick the ones you are going to put forward. We picked some from each state and that's what we produced.

It is not like they are going to learn something radically new here. The story is very

similar, if not identical, for all people, you know, all the plaintiffs. I mean, I was at every one of these plaintiffs' depositions and it is sort of like that new show Ground Hog Day really. I mean, it's the same schpiel (ph). I discovered this charge, I called and I was outraged. I mean, it's the same thing. So, I'm just -- if your Honor thinks 60 days is not enough time -- I think it is. We can extend it to 90. I mean, we will have to have an extension of the discovery and it just seems that it's not necessary to do now.

MR. OFAK: Your Honor, I have a few points whenever you're ready. First, these aren't absent class members. They chose to be involved in this case, they chose to be named plaintiffs, and we have been trying to depose them since the beginning of the case. At this point, discovery has to end at some point in the near future and we need adequate time to schedule their depositions, and their depositions may lead to some additional discovery.

In addition to that, your Honor, they have unique information and we are not just trying to depose them just because we want to. There is information that they may have that is very necessary for us to defend our clients. And if I may, I would like to

approach with two documents.

THE COURT: Okay.

MR. OFAK: The first document, which is only two pages, it is a letter and a check. This was actually produced by the plaintiffs and it is addressed to Kevin Chowning (ph). Now his wife, who is a named class representative, during her testimony, deposition testimony, she stated that her husband, Kevin, actually called and spoke with Cross Country Home Services and he also signed the check which is on the second page of the document.

The first page, which is the letter, indicates that he was in fact the person who likely called Cross Country Home Services. So we should be entitled to ask him questions about his conversations with Cross Country, his understanding of what he was signing at the time he signed the check, and other related information.

The second example we have relates to plaintiff Melanie Bordwick (ph). This is what is being commonly referred to as a fulfillment kit. Now many of the plaintiffs in the case that we've deposed have been refusing to admit that they received it. But again, this is a document that was produced by the plaintiffs, which is a copy of the fulfillment kit. It indicates

that she received this document, and we should be entitled to depose her and explore these different areas of information. So we feel the time is ripe now to actually depose there people so that we can finish our discovery.

MR. WITTELS: Your Honor, I haven't heard anything other than Ground Hog Day story here. I mean, this is a document that, this first one, that they always send to every plaintiff who contests, who disputes enrollment. There is nothing new under the sun here with this document. There is nothing that they have to ask him that they haven't asked her. It's just, really just sort of a make way if you will, just busy work. I mean, they didn't need his deposition before they opposed class certification and they don't need it now. I mean, there is no reason for it.

And this other document is the so-called -- they call it a fulfillment kit. It is the glossy brochure that everyone throws out. If one person kept it, so what? It doesn't matter. It doesn't even say what it is. We contest the whole issue of this document as being informative. The whole nub of the lawsuit is whether this glossy -- one part of it is whether this glossy brochure that they are relying on somehow informs people that they were involved in some

plan. If you can look at it -- we've studied this but there is nothing that even connects it to the check. So their own people say it's something -- their own head of marketing testified it was something they would throw out.

But there is no reason to the do the depositions now. That's the point. They have deposed 23 people. They have records of phone calls from people, these people. They have logs of all the back and forth in their own written documents. There is nothing new that they need to know from the depositions and certainly nothing has come out We'll do the deposition on Tuesday but, again, it's going to be another Ground Hog Day.

MR. OFAK: Your Honor, at this point, the plaintiffs aren't contesting that there were not allowed to take the depositions, they're just challenging the timing. And at this point, why wait? The end of discovery is coming and there is new information. These documents show that there is new information regarding these individuals. They are named plaintiffs in this case. They chose to be named plaintiffs. They did not have to be part of this lawsuit.

MR. WITTELS: Judge, you said yourself at

the beginning they may not be deposed if class certification is granted. There's probably no need for that. We're not contesting whether they chose to be part of the lawsuit or not. They didn't choose to be ripped off by the defendants either. The real question is, is there a need now? We don't know what the cutoff is going to be. Your Honor hasn't discussed that, if there even should be a cutoff now until we come back for the next hearing and see where we are because we're going to making a motion for sanctions involving what we thought was really improper, fraudulent conduct and not giving us -- not doing their discovery properly with the predictive coding. There are going to be disputes that are ongoing, certainly until -- we have no idea when we're going to get a ruling from the judge on the main issues, the motion to dismiss or class.

MR. OFAK: Your Honor, if I may make two points. There's a different standard perhaps for class members and these are not absent class members. They're not even generally people who decided to opt in. Named plaintiff is a different category altogether. Second, to the extent that Judge Garaufis allows for additional class briefing, this information may also be helpful in that respect.

MR. WITTELS: If the judge orders it -- we

have no idea whether he's going to have an issue. We've submitted the motion, it's fully briefed. Both sides briefed it extensively.

THE COURT: Was there any decision on that, because I got the sense from the last conference that there was a difference of opinion as to what Judge Garaufis was going to let you do with respect to the class certification motion. Was that ever resolved?

MR. OFAK: Your Honor, my guess is that there's probably still a difference of opinion. Our position is that because the plaintiffs filed a fourth amended complaint, we will likely be allowed to supplement our briefing, if not file new briefing.

MR. WITTELS: You have to remember what happened, Judge, on the last motion. When we had the conference in front of Judge Garaufis, he said, plaintiffs, you have a choice: You can stand on your third amended complaint or you can amend. Really, the only amendment we were contemplating at that time was the substitution of the Indiana plaintiff.

THE COURT: Okay.

MR. WITTELS: When we substituted the plaintiff, we also added a common law fraud claim nationwide or multi-state. The response or motion to dismiss that we got was addressed to --

MR. OFAK: 80% striking the class pleadings.

MR. WITTELS: -- striking the class pleadings. The judge said supplement and we wrote to him and we had an argument about it. We said, this is not a supplement, this is a new motion to dismiss based on your not having pled the class properly. We said, Judge, we've already briefed the class motion. This is duplicative, the case law doesn't allow it. He right away understood the argument and said, I'm disregarding everything you said about class, I'll take whatever else you said that's new. So if he lets the defendants supplement, if that was any telling, it's not going to be new, expansive briefing. It's going to be something new.

I don't know what could possibly be new from -- there's only one witness who is the husband of a class plaintiff. Maybe that, if they needed to depose that person. They didn't need him beforehand. Lea Chowning, I was at her deposition in D.C. They asked her everything, she answered everything. There was a motion that she couldn't answer, so I don't know what they're going to get out of him. But if they need him somehow and they want to supplement their class opposition for one plaintiff, okay. The others are not class plaintiffs so they wouldn't be supplementing

anything. I'm just saying it doesn't make sense to put us to the burden to producing all these people. There's prep involved, there's expense involved. We already had 23 of them.

MR. OFAK: Your Honor, if I may just correct a mistake I think Mr. Wittels has made regarding the procedural posture here. We did -- about this time two years ago, in 2015, we were having a similar fight over whether or not we were able to depose any of the named plaintiffs. We sought schedules from plaintiffs' counsel in order to start our depositions of the named plaintiffs in June of 2015.

At that point, the end of August, 2015 was the original discovery deadline. We had multiple conversations between counsel and multiple conversations with Judge Levy, including we took that decision to Judge Garaufis to discuss with him about the depositions that Judge Levy allowed us to take. So I think that stating that we've never sought to take these depositions is just a mis-statement about the procedural posture.

THE COURT: Part of this is going to depend on how long we need for the rest of discovery. You're taking the deposition of one of the plaintiffs, the recently substituted class representative?

MR. OFAK: That's correct, your Honor. It's currently scheduled for I believe September 5th.

MR. WITTELS: A week from today.

THE COURT: I think they should be permitted to take the deposition fo the husband as well, since he's at least closely related to their class representative. With respect to the other plaintiffs, let me table that for now and I'll come back to it when we decide what we're going to do with rest of the discovery schedule.

MR. OFAK: Your Honor, if I could just ask one question. The two documents I handed up to you are two different named plaintiffs. The first one is for the husband, Kevin Chowning. The second document I handed up, which his the fulfillment kit that they produced, that is for Melony Bordwick.

THE COURT: Okay.

MR. OFAK: The plaintiffs, like I said before -- they're stating that they refuse to admit that they received this document. Here, for this particular plaintiff, they actually produced it in discovery.

THE COURT: Okay.

MR. OFAK: So we'd also like --

THE COURT: So that particular plaintiff

received it.

MR. OFAK: Yes.

THE COURT: Okay.

MR. OFAK: We believe we should be allowed to depose her as well.

THE COURT: To say that she received the kit?

MR. OFAK: To understand what else -- does she remember receiving it, what did she do with it? Does she remember receiving the other documents related to it, why she didn't throw it away?

MR. WITTELS: Judge, I think your ruling is a fair compromise. While we don't think that the husband should be deposed at that point, at least it's a compromise. There's no reason to start doing individual discovery here without the class motion decided. The questions that counsel is raising, they ask of every plaintiff. It's nothing new.

THE COURT: I guess it's new to the extent that none of the others plaintiffs actually admitting to receiving it.

MR. WITTELS: When he says refused to admit, that's not exactly how the depositions occur. Their own head of marketing says most people throw it out as junk mail, and that's in the many documents. It's

considered to be junk. If someone saved some junk, it doesn't mean anything in terms of whether they were on notice of what it was.

THE COURT: Okay.

MR. WITTELS: The point is I don't see what she adds at this point. We've got motions to dismiss pending, we've got class certification pending. That's really where we have to get to. Plus, there's going to be more discovery. I think maybe if we could get to the next issue, we can come back if you want to change your mind, but I think you ruled on it. Why don't we get to the other motions now?

THE COURT: We'll do that. Let's talk about the rest of the discovery first and we can circle back to this.

MR. McINTURFF: The next item on our agenda is the plaintiffs' motion to compel defendants to revise their privilege and redaction logs to include post-lawsuit documents. We've submitted letters and laid out our arguments but just briefly --

THE COURT: Let me ask you this: You're looking for a privilege log for the stuff that they've withheld.

MR. McINTURFF: Correct, and we --

THE COURT: I guess there's been document

requests and there's been discovery and post-lawsuit have been turned over.

MR. McINTURFF: Correct, your Honor.

THE COURT: So all you're looking for is basically for them to log the stuff that they haven't turned over because it's privileged.

MR. McINTURFF: Correct. In order to reduce the burden, we've offered that the defendants that don't have to log any communications directly with outside counsel. We asked Ocwen to give us an estimate of how many documents that was. We were told approximately 900. We asked Cross Country. Cross Country wouldn't tell us how many documents that was, but we don't think it's going to be terribly burdensome because Cross Country previously logged those documents on an inadequate and deficient privilege log that they initially served.

When Judge Levy ordered them to redo their log, the second time around, they took them all off. So we think they've already logged them. I don't know. Counsel is not telling us whether or not they have any additional documents that they're not logging. Basically, we're looking for -- if there's a document that was in their production that they're withholding, we want them to meet their burden to show that it's

been properly withheld or redacted.

THE COURT: There's a reason why those privilege logs usually don't include post-lawsuit documents.

MR. WITTELS: If I may.

MR. McINTURFF: Go ahead.

MR. WITTELS: I think the case that the defendants cite in opposition is telling because if you look at page -- on page 2 of one of their cases, they cite a case from Magistrate Judge Brown where the judge says that normally, you only log documents that are before a litigation is commenced. He says, "This is due to the fact that in many situations, it can be assumed that all documents created after charges have been brought or a lawsuit has been filed... were created because of that pending litigation."

We have a very different circumstance here because we're not in one of those many situations. We have -- I don't want to say unique situation but we have an anomaly because here, what happened was, the defendants had continued the wrongful -- what we allege is a fraudulent practice. The billing --

THE COURT: The continued billing. You haven't continued the fraudulent conduct, which was the mailing.

MR. WITTELS: No. Judge, with all due respect, when we filed the initial complaint, we alleged a two-part fraud, which was that there was not only a fraud in sending the check solicitation, which had all the indicia of fraud for all the reasons we've talked about, but that the billing component was also part of that in masking it, which was sending bills that were not from Cross Country but from Ocwen, which kept having ever-changing language. And even if it was the same, it was ambiguous, not noticeable. It wasn't called to their attention. It came out of the blue, weeks after they supposedly had signed the check, many weeks after, so there was no way to connect it. So the billing fraud we thought would have ended when we started the lawsuit.

In fact, you know that Ocwen was sent a letter -- sent a letter to Cross Country saying, we want to stop billing. They thought that the fraud was over. But when they were told, you've got to pay 69 million dollars to end your involvement as our partner here, they backed off and obviously made a business decision, maybe because of the indemnity we've been talking about, and said, we'll keep billing. So there really is a two-part fraud here. It's not just, they sent a check, end of story. They stopped that part but

multi-millions of dollars, twenty million bucks has been collected since we sued them in 2013, so the jury is going to hear all about that. Why do they keep doing it? We've got documents about that and now they don't want to log documents. We're not looking for attorney/client privileged documents, we're looking for the other documents that were related to the ongoing fraud.

MR. McINTURFF: If I might add, your Honor, defendants' production goes well into 2015. The quote that my colleague referenced in defendants' letter about presumably, documents created after the litigation are all going to be privilege -- we've seen many, many documents created after the litigation and they're not privileged at all. They have to do with droves of customers calling and complaining and call center employees sicking out because they're getting abused by customers, the reaction of executives --

THE COURT: All that stuff is information that they've turned over to you and wouldn't be privileged, so it wouldn't be on the log anyway.

MR. McINTURFF: Correct, but the presumption that everything is privileged after the lawsuit, we've rebutted that because we know that there's plenty of documents they've turned over that aren't privileged.

On top of that, the burden isn't very great. Cross Country has already done it, to the extent that they didn't withhold documents initially, and then that would raise an issue as to why they told Judge Levy they logged post-lawsuit documents but then didn't log others, and Ocwen says it's only 900 documents, so it's not that burdensome.

THE COURT: Why do you need this stuff?

MR. McINTURFF: Because we believe defendants' assertions of privilege are, in many, many instances unfounded, and we think that they are not going to be able to support their privileged calls. We have no ability to test their privileged calls. They've already turned over some non-privileged, like for example the twelve documents that were sent to chambers in camera, they turned over two with fewer redactions. Those privileged calls were -- the word questionable is very, very light, to say the least, in terms of what they redacted and their basis of redacting them. So we have real grounds here to suspect that they're withholding documents on the basis of privilege and we want them to meet their burden to show that these documents have been properly withheld.

MR. WITTELS: Just to briefly follow up on that, Judge. They've given you -- originally, they

were giving you twelve documents to look at where there had been redactions. Fully I would say 15% of them, because that's roughly the two that they ended up turning over, had no basis to be withheld in the first place. If their privilege log is anything similar to that, then you're looking at at least 15% of the documents should have never been withheld.

I don't know what your Honor is going to find when you look at the rest of their redacted documents but Mr. McInturff brought these documents down here that they ended up turning over, and those were only turned over because we forced the issue. They weren't going to give us those redacted documents. They picked out -- if the word "legal" is in there. Maybe legal should look at it or consider it. They willy-nilly were over-inclusive in how they redacted a document. So we are suspicious and suspect about how they're going about it. We do think they should -- they have an obligation to log those documents, since the fraud continued after the lawsuit started. They should have a proper log.

MR. McINTURFF: If I could just add, I think it's probably the fourth or fifth time we've been here on a privilege issue. Initially, two years ago, Judge Levy ordered Cross Country's in-house counsel to

certify that all the emails that were being withheld as privileged, where he was supposedly acting as counsel, he had to certify that he was acting as counsel not in a business capacity.

As a result of that requirement, Cross Country turned over 2,000 pages of additional documents. I looked at it with my paper rings the other day in my officer for my printer -- that's how many pages they turned over. We think that we've more than carried our burden to show that the privilege assertions have been improper. And without a privilege log, we have no way to test it. We're simply relying on counsel's say-so.

MR. PREVIN: Your Honor, may I be heard?

THE COURT: Sure.

MR. PREVIN: First of all, the burden would be considerable. Speaking for Ocwen, it would be several weeks for us to (ui). This log we are estimating will take -- will contain approximately three times the number of entries as (ui). That is a significant burden.

THE COURT: Including if you eliminate all of the --

MR. PREVIN: That is a (ui). I actually don't have the numbers in front of me. It was less

than 20% (ui).

THE COURT: What about if you exclude in-house counsel and just make the same certification?

MR. PREVIN: I have not -- I don't have (ui). I assume we can -- relying on metadata, that may be possible. I assume (ui). Our view is that this is a marginal (ui). The stated reasons for these documents -- plaintiffs know -- yes, there are going to be ongoing complaints. Those have been produced. The primary reason I think sort of goes to why are we still billing -- they've asked lots of witnesses from all the defendants and every one has said it was a decision made on advice of counsel. So you're not going to get any more information from the documents on that.

This is in our letter. This was negotiated several years ago. The defendants relied on this provision in good faith. Ocwen (ui) pushed very hard for a discovery cutoff -- as of the complaint filing, we had not had this provision because of this very (ui) or we would have negotiated custodian search terms in an effort to weed out documents. Obviously, we're not there but we relied on this and plaintiffs have known about this issue for a year and a half and they're raising it now. Our view is that the discovery period should end within thirty days or something like that I

know that your Honor is tabling that issue for now but we are at the tail end of discovery. So to impose retroactively an entirely different standard for ESI production and logging documents that would carry a significant burden on defendants is unfair.

MR. McINTURFF: If I may respond, your Honor. Defendants still have not articulated what their burden would be. This case involves at least 100 million dollars at stake at this point, so we believe that the proportionality analysis -- defendants need to show that it truly would be overly-burdensome. We don't think it will be because Cross Country has already logged them, unless there are documents they're withholding that they didn't log initially.

For Ocwen, counsel hasn't even said -- it's 900 documents. This is not a tremendous undertaking. Counsel says it's three times what they've done before so they logged 300 documents before. It's not a big deal, it's not that expensive. And in light of the highly suspect privileged calls, we believe it's completely justified.

In terms of the timing, the timing relates to the revelations of the discovery misconduct that have occurred over the past few months. We now have substantial reason to suspect that because defendants

did predictive coding without telling us, among other things, to suspect that there was other misconduct, and we need to make sure that the defendants are acting properly in terms of the documents they're withholding.

Again, it's their burden and these documents are in their production. It's not like they're not in their production. They know what the documents are, they've pulled them out. They've got plenty of lawyers. It's not going to be too cumbersome to do it and we think that your Honor should order them to put these documents on a privilege log.

MR. PREVIN: Your Honor, any accusation of discovery misconduct is (ui). Ocwen didn't even use predictive coding so that's an issue that (ui) some of the other defendants. That's really beside the point. It is a significant burden. It would cost tens of thousands of dollars to do, potentially more than that.

THE COURT: Let me just stop you there. Let me ask the plaintiffs this: Have any of the alleged discovery abuses that you've articulated been with respect to Ocwen? Because the vast majority of stuff that I recall with regard to privilege problems and other things have all been directed towards Cross Country.

MR. McINTURFF: To date, it has been to

Cross Country. In order to be most sufficient, we're seeking your Honor's guidance on issues such as privilege and redaction logs so that we can then address those issues with Ocwen once we have sort of an idea of where we can predict where your Honor would rule.

THE COURT: I think if you're looking at it from that standpoint, you have a better argument with respect to Cross Country than you do with respect to Ocwen. I haven't seen anything from Ocwen's end that would justify changing the ESI protocols at this point.

MR. McINTURFF: I take your Honor's point. We still don't think it's that burdensome. In light of the fact that the defendants have continued to collect monies from the challenged conduct and we know that there are documents that are -- that have been produced that are responsive and are relevant. We think that they should be required to meet their burden.

MR. WITTELS: Judge, they're looking at a period from 2013 until now, where Ocwen has been involved -- knowing they wanted to get out of the scheme completely, they didn't and they've continued to bill. There's been interchange between the two companies. We have some of those documents. We know that they've been interacting with each other about

complaints because a lot of people call up. First they go to Ocwen, they end up at Cross Country. Cross Country then tells Ocwen, give them a refund, so there's a lot back and forth.

But the point is there's a whole block of time where we've gotten documents and Ocwen is now saying, we're not going to tell you what's attorney/client privilege, we're not going to tell you what's work product. We don't really want the work product and we don't want the attorney/client. We want to know if they properly characterized those documents. Until we see the log, we can't even challenge it.

THE COURT: Okay, but you haven't given me any reason to believe that Ocwen has it. The fact that one of the other defendants -- I'm not even saying I agree with you but the fact that one of the other defendants has improperly asserted privilege doesn't mean that it should be imputed to Ocwen.

MR. WITTELS: Judge, what we're saying is, in the first instance, you're sort of putting the burden on us to say we need to show --

THE COURT: Because you negotiated this ESI protocol two and a half years ago.

MR. WITTELS: Not understanding that they had continued -- that the fraud had continued in the

way it had. A lot has evolved. It's taken a lot of discovery and a lot of digging to get underneath it. Before we even got documents, it was years, before they produced.

MR. McINTURFF: We didn't know that they had continued billing until May of 2016.

MR. WITTELS: We didn't realize that because the first answer had a small amount of money they collected. So you're asking us to sort of tell you what they did wrong in terms of -- you're saying, you haven't shown us that Ocwen improperly withheld documents. We don't know what they did because we haven't got the log to see if they're asserting privilege properly.

THE COURT: You got their log with respect to everything else.

MR. PREVIN: Your Honor, plaintiffs just admitted that they were aware of this issue fifteen months ago. To raise now, at the close of discovery -- they already know the critical fact. I'm not sure what they're looking for. They know billing has continued. The reasons behind that are going to be protected by attorney/client privilege -- the lawsuit was filed.

MR. OFAK: They've also had the opportunity to ask multiple Ocwen and Cross Country

deponents/witnesses about this practice. The fact of this matter is not a surprise, nor is it new to them.

THE COURT: You're conflating the issues. I'm not saying that this information post-lawsuit isn't relevant and that there's not some non-privileged material there. What I'm asking you is -- the question I asked was why you needed the privilege log, and you said you needed the privilege log for that post-lawsuit stuff because you have demonstrated instances where the defendants have improperly asserted privilege.

Assuming I agree with you, that still only applies to Cross Country, not to Ocwen. So it's not that I'm shifting the burden to you but I'm trying to explain why the privilege log, at least with respect to Ocwen, is something -- I'm not saying that you're not entitled to get non-privileged documents during that time period. It sounds like you already have. But there's been no indication that Ocwen hasn't been producing what they should be producing to you with respect to that time period. So I'm just not sure why we should revise the ESI protocol and make them go back and redo the privilege log with respect to these post-litigation documents, when there's been no suggestion that they've done anything improper with respect to the privilege so far.

MR. WITTELS: Ocwen's cousnel for some reason was assigned the task of responding to this motion for Ocwen and for Cross Country.

THE COURT: Okay, well --

MR. WITTELS: If we accept your Honor's ruling at this point -- you seem to be saying you haven't shown Ocwen. At least Cross Country, we have shown a problem, so they should log their documents and supplement them with any documents they have not --

THE COURT: It sounds like they already did log their documents.

MR. McINTURFF: They did in the past and then they took them off.

MR. WITTELS: That was how many years ago?

MR. McINTURFF: It was in February of 2014 or '15.

MR. WITTELS: They should reserve it and supplement with any other documents that they haven't included.

MR. OFAK: Your Honor, if I may just for a moment. I want to start out with the fact that plaintiffs' attempt to recreate the record of what has occurred here -- they try to make Cross Country out to be some sort of serial discovery violator when that's simply not the case. For a variety of reasons we'll

get into when we discuss the extension of the discovery period and discuss what the actual obligations and what actually happened with the predictive coding are, those are simply accusations that quite frankly, in our opinion, are baseless at this point, that plaintiffs have refused to actually deal with us in good faith on.

Secondarily, with regard to the privilege log, Judge Levy never ordered us to redo our privilege log. What we agreed to do was to redo our privilege log in a certain manner. We had a dispute over the form of our privilege log, which you'll recall because plaintiffs' counsel brought it up again at our last hearing. That was about whether or not we could group by category on the privilege log. The first privilege log, we readily stated at the first hearing -- we said they raised a couple of items that we think are valid issues for us to address. We went back and we addressed them. We did that voluntarily and we reproduced the privilege log.

At that point, too, we also identified that we had initially logged post-complaint privileged documents on that original log, which was from January, 2016 is when that log was provided. So we identified that and we identified two plaintiffs, both at that hearing on the record and subsequently, that what we

were planning on doing was, because we had agreed under the ESI protocol to not log post-complaint privileged documents, in order to make the process easier, to streamline it and make it faster for us to get a revised privilege log to them. We were just going to take off privileged documents that had been logged post-complaint. We got not complaint from anyone at that point. In fact, we hadn't heard about it again until this idea or this issue raised its head recently.

Again, these issues are not new. Plaintiffs' counsel knew about it and they agreed to it with us in the ESI protocol. We agree with everything that Ocwen's counsel stated for the reasons why we shouldn't have to log post-complaint privileged documents. However, the amount of documents that we have is far larger. I only have the metadata to go by right now. Presumably, they still have the version of the privilege log that we originally produced. We had no agreement where they had to destroy it. If they have any issues with any of the documents on their post-complaint, they certainly can talk to us about it.

But there are roughly 3,500 documents, that's responsive and non-responsive, because the way that we group them, anything that was responsive gets all family members pulled in, whether it's responsive

or not. So for purposes of our discussion of the number of documents, that 3,500 number is responsive and non-responsive. The number of actual responsive documents is only about 2,000. Of that 2,000, what we can tell from the metadata -- we would have to go back and review to actually comply with their restrictions, which are to outside counsel or even to inside counsel, about 2,200 of those documents with families. So that includes non-responsive family members and even non-privileged family members that we would have no obligation to provide in the first place fit into either sent to outside counsel or inside counsel.

So depending on what the number is here, that's still a pretty large amount of documents to go through for a purpose that I have still yet to discern because plaintiffs' counsel have the actual documents, for instance about the continuation of billing. The reason they know about that is because both Ocwen and Cross Country produced documents about it. We have had meet and confers on specific subjects where they thought there might be additional documents. We've gone back and we've found a few additional documents through an additional review, but nothing out of the ordinary in the standard discovery operations.

So at this point, they claim to have

identified a very large number of discovery "violations." We disagree completely with that but they're also taking the wrong numbers. So Mr. Wittels stated that of the twelve redacted documents that they challenged, we produced two, and he then produced a percentage based off that.

But in reality, what you need to look at is the total number of redacted documents that we provided on a redacted privilege log, which is hundreds, only twelve of which they challenged, two of which we looked at and we said, okay, we agree that that particular line -- while we don't think it's a privilege call, we go back and we look at it and we say, we understand why the privilege determination was made at the time. At this point, we agree to produce it. You actually have those documents as well. You have all twelve. Regardless of whether we decided to produce them or not, we included them, including the redactions. That way, you can see our good faith.

THE COURT: Which ones did you produce? Is it listed on there?

MR. OFAK: It's listed in the documents, yes.

THE COURT: Okay.

MR. OFAK: In terms of the greater privilege

log, we've had meet and confers, we've had discussions, we've talked about this. I think the redacted log is a perfect example of this. At the last hearing, you'll recall we had a long discussion about -- we weren't quite sure what documents they were actually challenging on the privilege log. It appeared to simply be a broadside attack on the entire privilege log.

At that hearing, we finally realized what the specific documents they were challenging were. Had we just simply had that discussion beforehand, I think we could have streamlined the dispute much better, but I think that happens a lot and that actually has happened in a few other items they put on their agenda this week, issues that they've addressed with the Court that they hadn't even come back to us on yet. I think that this is consistent with the pattern of issues that we address on a regular basis in this Court. Most of this stuff is better suited to simply deal with out of court, but we don't think that we have done anything wrong or that any discovery violations have been shown that warrant them going into the thousands of documents we would have to take a look at and log post-complaint.

MR. McINTURFF: If I can just briefly respond, your Honor.

THE COURT: Both sides kind of talk about the general reasons why you have privilege logs that can cut off at the filing of a lawsuit. There's at least an arguable basis here for why that might not be the most workable solution to this case, given that there are -- I don't know exactly what the number is but there's at least some discovery that's been produced in the post-litigation time period. So I'm not sure that you can look at it and say, well, we're not going to require a privilege log for that time period because the presumption is that everything that was created after that time period would be privileged. I don't know that you can say that in this particular case.

Neither side has really kind of pointed to any cases and I haven't done the research myself, so I don't know if there are any, but are there any cases that talk about situations like this, where you have a fairly relevant portion of documents that's being produced post-litigation and how that affects the presumption that materials created post-litigation would be privileged?

MR. McINTURFF: I can say, your Honor, I haven't seen a case but there's an additional fact in this case that I think takes it out of any potential

case law research, which is the defendants -- in Cross Country's case, they've already logged the documents. They logged the documents and counsel wasn't accurate in his description of what they said at the hearing before Judge Levy. They didn't say, we're going to take these documents off but they took them off their privilege log, so they've got them logged.

The only thing that we're asking is that they put them back on the log but they do so in a manner that conforms with your Honor's ruling at the last conference regarding how privileged documents needed to be logged. If you remember, at the last conference, we had this issue with emails, where they were just logging the sender and the recipient and the last email. If we just look back at their privilege log, assuming that they logged all of the documents at the time, if we just look back at that initial privilege log, we have the same issues.

So really what we're asking is just for them to re-log the old documents that they've logged and do so in a manner that complies with your Honor's last order, which was if you have a string email, you have to make it apparent so that we can see. That should be -- there shouldn't be hardly any burden there.

MR. OFAK: I have a few responses to that.

First of all, I think this really goes back to the idea that this is an agreement that we made at the beginning of this case. The agreements that the parties make among counsel have to mean something. So far, they haven't meant anything in this case because we've blown through our case management plan. We've blown through all of the things that we agreed in the case management plan and now we're about to blow through the ESI protocol on privilege logging. So at some point, agreements between counsel and things that we've put in front of the Court and had agreed to and consented by the Court have to mean something at some point in this case.

With regard to whether or not there's any authority out there on point, we think the authority we put out there is relatively on point. It may not be specific to the exact fact pattern, but we think that that general basis is what leads people to agree or make such agreements about not logging post-complaint privileged documents in the first place. Secondly, I think that the timing of this particular issue again identifies some of the lack of importance of this issue. I did in fact state at that hearing in front of Judge Levy that we were taking off the documents from post-complaint. We talked about that. I don't have

the transcript in front of me but I can point you to it if you'd like.

Secondarily, it's something that they've known about for, at the very least, fifteen months. Why have they brought it up now, when discovery is supposed to be ending at the end of August. I think that ultimately, we have a lot of sort of ministerial issues, minuscule, ministerial issues that they're taking issue with in the document production that we simply -- we are attempting to address and we're not really getting any traction on.

But the fact of the matter is that they stated, I believe it was in March, at the two hearings in front of both your Honor and in front of Judge Garaufis, that they had all the documents they needed in order to go to trial and set a trial date. But now, we're sitting here today and they're stating something different. I just don't understand at this point why we have to go back and re-log these documents and re-log them in a manner that -- it's my recollection that there wasn't an order but there was an agreement that we would provide documents in the form that we actually just produced to them last week, that is documents that didn't have an attorney on the to or from. We agreed to provide a line-by-line production of that and we did

that.

MR. WITTELS: Judge, if they logged them once, they obviously thought they had to log them. They pulled it off for no good reason. We're not going to sit here and talk about nearly five years of litigation, what stands and what doesn't. As your Honor knows, in any case, issues change constantly, orders change constantly, depending upon what happens. So this argument about, well, orders have to mean something -- orders are informed by what happens in the case. When we get to the facts of why we're making this sanctions motion, it's because there is a real question about what's going on here.

We had an ESI -- we negotiated search terms. We spent weeks, months negotiating them. We had to bring down our ESI experts to negotiate. Then we find out through our own digging, literally on the eve -- two months ago -- that they did predictive coding without telling us. Every case you look at says that predictive coding is supposed to be open and transparent. They didn't tell us. We discovered in open court that they had done predictive coding on documents that had been found through the search terms. They still haven't -- even now, we spent the last few months trying to figure out what their predictive

coding was about and they won't tell us.

So we're here in a very unusual but unhappy situation where we are challenging a lot of what the defendants do in their discovery because we can't trust what's being done. That's why we're going to make a sanctions motion, because we've got case law to back it up, that they didn't act properly. So we're asking for logs of what's privileged and they're objecting when they already logged the documents. I don't understand why they wouldn't log them now. Post-litigation documents are obviously relevant. Therefore, the documents they're withholding should be logged.

THE COURT: You've got the documents they previously logged. Is there any reason why you can't use that to -- assuming that there's maybe some additions to that, but is there any reason why you can't use that prior log to at least decide whether or not they've properly asserted privilege for those documents, the same way that you did with the more recent ones?

MR. McINTURFF: If I can correct -- counsel confused the privilege log and the redaction log issues. The redaction log -- your Honor ruled that because we can look at the documents and we can see the documents, that that didn't need to be adjusted. The

issues we raised with the privilege log resulted in defendants producing a revised privilege log that dealt with the email chain issue. The old privilege log, assuming that it contains all of the documents they're withholding, is going to suffer from that infirmity, as well as the other issues we raised in connection with the privilege log motion.

We think if they've already logged them, they can at least produce to us a log that conforms with the most recent iteration of the privilege log, one, so it all looks the same and is standard, and two, that we don't have the same problem -- because we'll just be back here in front of your Honor requesting that your Honor enforce the Court's order regarding the prior log because, as is the case with all of our meet and confers with Cross Country, when we ask them if they do something to correct their privilege log, they're going to get told no.

We would ask that prospectively, since they've already logged them, that they be ordered to conform with your Honor's -- the rulings in the prior conference -- to conform their privilege logs with their rulings in the prior conference and to notify us if there are any documents that they're withholding that weren't on the prior log.

MR. PREVIN: Your Honor, just for clarity of the record, they sometimes loosely use the term "defendants." All of that relates to Cross Country.

THE COURT: Okay.

MR. OFAK: Your Honor, the only thing I have to add is, at this point, I think our position is clear. We will comply with whatever you order.

THE COURT: Do you know if there are additional documents that were withheld that were not on the previous log?

MR. OFAK: I think it's unlikely because the additional productions that were made after were for the time period previous to the complaint.

THE COURT: Okay. So all of the post-complaint documents should have been produced in that first batch.

MR. OFAK: Correct.

THE COURT: Remind me again, the issue between the old privilege log and the new privilege log is that it's not always clear whether it's the attorneys that are getting emails or are on the email chain?

MR. McINTURFF: Correct, the senders and recipients.

THE COURT: Or whether it's one of those --

it references an attorney and that's why it was being logged as privileged, that kind of thing?

MR. McINTURFF: Correct. If you want, we can go back to the transcript of the last hearing. Perhaps, in order so that we don't lost any precision, your Honor could just order that the log be conformed to the Court's orders from the last hearing, because I don't want to mis-state exactly what went on because it was a number of -- there were a number of things that went on.

MR. OFAK: I do think that, for clarity's sake, we should be clear about what's going on. It's my recollection of what we did that we agreed to log individually all privilege lines and their groupings that did not contain an attorney in the "to" or "from" on the privilege log. That is what we did. If plaintiffs' counsel are stating that we need to do that for every single line, that's just attacking our categorical privilege log again, which I think your Honor was fine with last time and Judge Levy was clearly fine with the first time it was attacked.

MR. McINTURFF: I think counsel is correct. That's my recollection. I just didn't want to mis-speak.

THE COURT: Here's what I'm going to order

you to do at this point. Check to see if there's any new documents that were not previously logged in the last privilege log. If the answer is no, then you're going to have to explain to me why that earlier privilege log is not sufficient for you to make whatever privilege challenges you want to make. It might be, I don't know. If you get the verification from them that there's no additional document that they've withheld, you might be able to use the log that was previously produced to decide whether or not they properly withheld anything. But if not, you're going to have to explain to me why not so I can specifically tailor it to what you need.

MR. McINTURFF: Okay.

THE COURT: But I'm not going to order that with respect to Ocwen. The only reason I'm doing it with respect to Cross Country is because they've already essentially produced it.

MR. OFAK: We'd request until September 15th to produce that, your Honor.

THE COURT: You don't have to produce anything.

MR. OFAK: To produce the answer is what I mean.

THE COURT: Okay.

MR. OFAK: Because we're going to have to do some work with --

THE COURT: That's fine.

MR. OFAK: -- our vendor. We may be able to get it earlier.

THE COURT: Okay.

MR. OFAK: With the Labor Holiday, though, I don't --

THE COURT: That's fine.

MR. McINTURFF: Okay, your Honor, the next issue is regarding plaintiffs' forthcoming sanctions motion. My colleague, Mr. Wittels, is going to address this but just briefly, there have been a number of letters submitted. We think that in light of Cross Country's failure to make key disclosures regarding its imposition of a predictive coding protocol, really at this point, both as a matter of timing and just in order to properly lay out the issues, we intend to submit a motion. We think that that sort of venue is the best place to address the outstanding issues because we've obviously reached an impasse in terms of what defendants are willing to disclose about what they did. My colleague, Mr. Wittels, is --

MR. WITTELS: Judge, I don't know really that it's right. I mean, we've gone back and forth on

it in discussions with you. Your Honor said, although I was in another land when you said it, at the last hearing --

THE COURT: You were on the phone, I believe.

MR. WITTELS: I was listening until the end. Then it got very late and I don't want to confess what happened to my sleep at that point, but it was getting very late. I remember that. Your Honor came out and said, there are real concerns here about the transparency with respect to the predictive coding and what we've done. There's no point really in debating it here. We've decided that, based on our inability to ferret out what went on with their predictive coding, we're left with no choice but to make the motion.

We don't think we have to have -- the defendants take the position, you haven't shown us that what we did was wrong. The fact that they did, in our view, is wrong, okay?

THE COURT: Okay?

MR. WITTELS: Out of the box. The fact that they did it without telling us, the fact that it wasn't negotiated at the beginning and that they weren't transparent and said, we want to do predictive coding -- that was also something that should have been told

to us. You can't do, in our judgment, predictive coding on top of the ESI without having that part of your protocols, on top of the word search.

So there's a very strong case -- I think we may have alluded to it -- where, similar to our case, the court said, you didn't do it properly. You can't come back after you do a word search negotiation that, again, I tell you took months and much time and expense with the ESI experts, and then try to do predictive coding. Ocwen has conceded that they never did it. They knew it wasn't proper. Judge Levy called for transparency. So here we are on the eve of -- two days away from what was going to be the cutoff, hearing that they had found 400,000 documents, apparently -- I'm roughing it out -- and on top of that, 400,000. They culled it down through predictive coding to about 100,000 documents.

We're not going to start discovery again, which is what they want us to do. Tell us what we did wrong. We don't want to go down that route. There has to be a sanction for what they did because out of those 400,000 to 100,000, there's got to be thousands of documents that are pertinent to this lawsuit that they have not produced. We won't know that and we don't want to go down that route so we're going to ask for

stiff sanctions against them for doing this. I've never been in a case where they did that.

My last round of predictive coding -- one of the judges who sort of was the -- I guess the guru, Judge Peck here in the Southern District, about predictive coding. We fought not to have predictive coding at all in that case. That engendered a decision that has now been cited many times over, as to why predictive coding is okay to use. But it's only okay if you're transparent and you do it from the beginning. There was a debate from day one, not about them doing it after they had already negotiated a word search protocol. So we're going to hash it out with you, Judge, and with defendants, and you're going to decide if it's sanctionable, what they did, because this is really an important issue.

THE COURT: Okay.

MR. TEPFER: Your Honor, if we could just --

THE COURT: Do you want to set a briefing schedule for that motion?

MR. WITTELS: We're going to need --

MR. TEPFER: Could we just address one issue before we do that?

THE COURT: Okay, go ahead.

MR. TEPFER: One of the issues -- I think

what they're failing to recognize is that they haven't been prejudiced by this. Let's put some context around what actually happened here and co-counsel will correct me if I mis-state anything. There were negotiated search terms which were applied to reduce a universe of three million documents to half a million documents. That's what they understood has happened and that's what has happened. That universe of documents, that 500,000, then had predictive coding run, and the production is out of that half a million documents.

We've said to the plaintiffs, look, give us what you would run through the algorithm and we'll run it, at substantial cost to us, or identify for us what you think the deficiencies are, because what we're talking about is how you get to a production set from that half million documents. Whether it's predictive coding or manual review, we're only talking about producing from that half million documents because we got to that half million documents using the search terms they agreed to.

So we've offered to run a seed set of their choosing and would tell them what's different in their seed set than the one that we used, and we would produce responsive, non-privileged documents from running that algorithm. They've refused to do that.

We've also said to them, tell us what the deficiencies are -- identify for us, in other words, the prejudice so we can work with you in an attempt to cure it, even though we don't think that there's any prejudice here, and they've refused to do that.

All they want to do is file the sanctions motion without even identifying what the prejudice is. The sanctions motion isn't just going to be, hey, they did something we don't like. Therefore, we should get stuff sanctions against hem. It's they did something that has resulted in incurable prejudice. We're trying to say to them, what is the prejudice? Give us an opportunity to cure it with you, and if you cannot cure it, that's when we get into sanctions territory. We're not even there. They haven't even responded to our offer to try to compromise this.

In a letter we submitted to your Honor last night, which outlines all of the meet and confers, where we left off is, they're refusing to provide to us any information as to how they were prejudiced. They haven't responded to our offer to say, hey, we'll run the seed set for you and give you that. They just want to file the sanctions motion for whatever purpose they want to, which we think is pure gamesmanship. So we can set a briefing schedule to do it but they should

meet and confer before we get to a briefing schedule, and identify the information outlined in our letter as of yesterday which they've refused to respond to, Judge.

MR. FIOCCOLA: If I may just follow up quickly, the information they claim that we're not providing to them, what they left out is that we're asserting work product privilege over that information. So it's not -- we're not just simply saying, you don't get this. We're saying, this is work product. This is fundamental work product and our determination and our process of how we determine what is responsive and not responsive in complying with our obligations under the discovery rules. I think that our letter stated pretty clearly why we think there is no discovery misconduct here, but if you have any questions about that, I'm happy to answer them.

MR. WITTELS: Judge, MoFo was not involved in this process until they came on board right before the trial. So they, as far as we know, were not involved with the decision to do predictive coding. It was made way back when, after they had ascertained that there were -- I thought it was 400,000 but 400,000 to 500,000 documents. I understand counsel is representing his client but what we're really

challenging is what went on beforehand.

When discovery is closed or was going to be closed two or three months ago, we thought it was an end, and we discovered that there was a fundamental flaw in how the production occurred. We're now faced with a very bad choice, which is to now start negotiating a predictive coding model, which is what they're asking us to do, which may result in reviewing tens of thousands of documents more or hundreds of thousands. Who knows what they have to produce if they went down that route, or saying no, you just did it wrong, you were not allowed to do it. We have this case and we'll argue it.

The Progressive case out of the District of Nevada was the only one we could find right on point, where the court said -- I'll just quote this part because it's germane: "Had the parties worked with their e-discovery consultants and agreed at the outset of this case to a predictive coding-based ESI protocol, the court would not hesitate to approve a transparent, mutually agreed upon ESI protocol. However, this is not what happened. Progressive agreed to search the universe of documents identified in the stipulated ESI protocol using search terms."

The court said no, you cant do -- in that

case, the defendant, after doing the search, came to the judge and said, we want to predictive coding to what we have now found through the initial search. The judge said no, now you're going to produce all those documents. That's how it ended. I'm not going to get into the nitty-gritty of the case because we'll argue it when the time is here. But they at least in that case went to the judge and said, we want to change what we did. We want to change what we negotiated, which was a word search through ESI.

But here, we didn't even find out about it until we ferreted it out, and they didn't even tell us voluntarily. It was hidden. We're just not going to play that game, which is, tell us what we did wrong, blame us for not negotiating properly with them, when they won't tell us -- now they're claiming work product on the seed set, when that's something you fight about at the beginning, as to whether you're entitled to the seed set -- we think we are -- whether you feed the documents in without doing would searches. That's how you do the predictive coding from the beginning. You use the computer and the algorithms to do it. They want to start the discovery process again and we're not going down that road. It's a massive burden to us, so we have no choice but to make this motion, basically.

MR. TEPFER: Judge, what does that order look -- assuming everything he said was true, at the end of the day, there has to be some prejudice that has to result in something to be cured. That's the basis for the sanctions. They won't even tell us what's wrong with the end result. They're focused on the process and not the end result that they actually have to use in litigation. That's the point.

Our point is that our system was over-inclusive. The results were better -- they produced more documents than otherwise would have been produced through a manual review. This is a well-accepted methodology for producing documents. Without them telling us what the deficiency is that they're claiming is the basis for any prejudice, their can be no sanctions motion. That's not the analytical framework for a sanctions motion.

MR. FIOCCOLA: Just to add to this, the case that Mr. Wittels has cited, the Progressive case out of the District of Nevada, does not stand for the proposition that you must consult with opposing counsel or that you must seek permission from the Court. In fact, the ESI protocol in that case -- they negotiated -- there were two options. They applied search terms and then the two options to produce to the FDIC from

Progressive were produce everything or do a linear review.

That was literally written into the ESI protocol. So what the judge was doing in Progressive was upholding the agreement the parties had made at the beginning of the case. We don't have such an agreement in this case. We don't have an ESI protocol that says anything about how the documents are to be reviewed once the search terms are agreed upon.

And just to push back on some of the other misconceptions about TAR (ph) that have been stated today, if your Honor would like, we have Adam Cohen here in the Court. Adam is one of the country's foremost experts on TAR. In fact, he literally wrote the book on electronic discovery. If your Honor would like to hear from Adam about generally how predictive coding works or TAR works and the processes and the general trends, we're happy to do that. I know Adam is prepared to discuss it with you or answer any questions if you would like.

MR. McINTURFF: Your Honor, first of all, we object because this is premature. We'd like -- we're going to file our motion. We think the motion will lay out the proper framework. Defendants have obviously sandbagged us with this expert that they never

mentioned that they were going to bring. But we don't think it's appropriate at this juncture to basically argue the motion. We'd like to brief it and put it into proper context.

Obviously, we strongly disagree with almost everything the defendants are saying but this isn't the appropriate forum for us to disagree about their assertions that we haven't been prejudiced or for us to disagree that what they call TAR, predictive coding, is always necessarily better than an attorney review, especially since an attorney has ethical obligations and isn't -- can't just be trained by a crooked attorney to spit out whatever you tell it to do.

We asked for the defendants to give us their seed set documents, the non-privileged ones. We asked for them to give us the documents that they coded and how they coded. They won't tell us any of that. The case law is really clear that that type of transparency is what's necessary. We want the opportunity to argue this in an orderly fashion. Obviously, defendants -- this is just a last-gasp effort for them. They don't want us to file our motion. They're doing everything they can to prevent us from filing the motion. We want to file our motion. We believe that it will be successful.

We think that it's proper to brief the numerous misrepresentations defendants' counsel made to the Court, to us as plaintiffs' counsel, in papers. So we think that we need to set it all up first before we argue the motion and then we can bring our expert, which we likely will have back to discuss with their expert. Hopefully, next time, they will tell us they're going to bring somebody before they bring him down.

MR. FIOCCOLA: Your Honor, I would just suggest that if you haven't read our submission last night on the issue, do that before you decide this issue so you can see -- we outlined the full context of our discussions to date. There's I think four exhibits to that, which are the communications back and forth. I think your Honor should take a look at that first before deciding this issue and whether this issue is ripe or whether the parties should continue to meet and confer to try to resolve this, in light of the fact that there has been no showing of prejudice.

MR. WITTELS: Judge, we're entitled to file the motion, again with respect to your Honor of course reading whatever you want to read and whatever defendants want to suggest. We're preparing the motion. We're going to file it.

THE COURT: Look, I've reviewed the materials that you did send. Ultimately, it's plaintiffs' burden to show that sanctions are warranted and what those sanctions should be. I'm not going to preclude them from filing the motion. If you don't think they're going to be able to make out the prejudice prong, then put it in your response.

MR. FIOCCOLA: I'm not arguing that they don't have a right to file the motion. What typically happens is you have to meet and confer to try to resolve that. What I'm saying is, I don't think they've in good faith been meeting and conferring because we said to them, you haven't offered --

THE COURT: You've offered a way to remedy what you believe --

MR. FIOCCOLA: We offered a remedy in light of the fact that they haven't provided to us any deficiencies to be remedied. That's the problem. They're saying, we want to file this motion but we're not going to tell you how we were actually harmed by it, which would trigger our obligation to meet and confer to try to resolve it. They won't even do that so we don't have the opportunity to try to resolve what that prejudice is because they haven't identified it for us. They just say, we're not going to tell you,

we're just going to move for sanctions.

THE COURT: It sounds to me like their argument is, the prejudice was that you used it in the first place.

MR. FIOCCOLA: But that's --

THE COURT: You may disagree that that's prejudice but --

MR. FIOCCOLA: But, Judge, you have to look at what the end -- back to my first statement. You have to look at what the end result is of this system. We went from three million documents to half a million as a result of search terms, by agreement.

THE COURT: Okay.

MR. FIOCCOLA: So we are only talking about how do you get from that half million documents to the production set, okay? We used technology-assisted review to get from that half million to the set. What they're saying is no, you should have reviewed everything manually and then produced.

THE COURT: Okay.

MR. FIOCCOLA: So what you need to look at is, what's the delta between what the individual review would have been versus what the system had looked at and identify for us what you think is missing. Are there -- for example, let's say there's an email chain

and you don't find -- and it's asking Joe Smith a question, and we can't find the response for Joe Smith. Either Joe Smith didn't respond via email because he called or they had an in-person meeting, or for some reason that email didn't get picked up.

So you'd say, this seems to be a deficiency because I have a string of emails that have these open issues and nobody has responded. So you would say, that looks like it's deficient, can you go back and look? Then you can pull those and pull those families and take a look at them. That's how you would do that to resolve whatever you think is missing from that production.

So when we say you look at the end result, what was actually produced, what is deficient about that, that has resulted in the prejudice? They haven't identified that for us. You need that because you need to understand, what is the difference between what plaintiffs think was done and what was actually done that has harmed their position. It can't just be, you didn't tell us you were doing that, because at the end of the day, it may be that there was no difference, that we produced more documents than we otherwise would have produced.

But without them identifying for us specific

instances of deficiencies, what are we really talking about? What is the harm that they alleged suffered that justified sanctions? That's what we're talking about. It's negotiating in good faith. When you have a sanctions motion, usually, you have to meet and confer and identify what the problem is. When it cannot be cured, that's when you get to sanctions, but we're not there yet. They just want to jump to -- they can file their sanctions motion but you have to follow the process to even get to that point.

It's not right because they're going to include information in their motion that they're not telling us in the meet and confer because they're refusing to tell us. How is that good-faith negotiation on meet and confer? That's not. You have to identify the prejudice that you're claiming. They're going to filed a sanctions motion without having yet identified for us what the prejudice actually is in the end result of the process that they're complaining about. That's the issue.

MR. McINTURFF: Your Honor, respectfully, just to give some background, search terms were negotiated with the idea that they would be reviewed by an attorney who is an officer of the Court. The case law is clear that you don't do predictive coding on top

of search terms, so that's the first major, major problem. Because they didn't disclose that they were going to do predictive coding, they argued and represented to us over and over and over again that we needed to cut this search term down because it was going to be too expensive for us to review and we needed to narrow this search term because it was going to produce too many documents that would be too expensive to review.

Then they went to Judge Levy and they said, Judge Levy, you have to narrow the search terms that they want to use because it's going to cost us too much in attorney time to review it, all the while duplicitously knowing that they were going to do predictive coding. They then did predictive coding without including us in any aspect of the process. We're going to show that had we been included in the process, it would have been very different. It would have been much more transparent. As a result of the misrepresentations to plaintiffs' counsel and the Court and their opaque process that they're still refusing to show us the fundamental documents that they used in educating this machine to produce documents.

They're claiming they're privileged. In ever other case -- I'll read from the Progressive case.

"In the handful of cases that have approved technology-assisted review of ESI, the courts have required the producing party to provide the requesting party with full disclosure about the technology used, the process and the methodology, including the documents used to train the computer."

They're giving us half disclosures, very vague disclosures. They've changed their story a few times. They aren't giving us enough visibility into the process. They're not giving us enough visibility into the methodology. They won't produce any of the documents that they used to train the system. They're essentially arguing, you need to tell us which documents of the three million that we then narrowed down with fraudulently induced search terms that we didn't produce in order to sustain your burden.

We disagree. We're ready to make the motion. We've had enough meet and confers. They're claiming privilege on everything that's important and we think that once we make the motion and they respond and your Honor has a chance to review the papers, then we can have an orderly conversation. They just don't want us to make the motion because they've cooked up this idea that you've got to show exactly what documents we're withholding when they didn't produce

them. We don't know. We don't know what we don't know.

We know what we do know, which is they didn't tell us they were doing predictive coding, they didn't include us in the process. Now that we've inquired about the process, they won't give us any real transparency, so we believe that the time is now -- the meet and confer process is played out. They just want to drag this on for months and months and months. We're ready to make our motion.

MR. FIOCCOLA: In fact, we do not want to drag this on for months and months and months, which is why we're trying to cut it off at the pass, your Honor. But having said that, I think that plaintiffs are taking one line from a case that is literally factually distinct from our case and extrapolating a lot of stuff that is not true about the case law that is underlying that. I can sit here and I can explain that to you but like I said, we have Adam Cohen, who literally wrote the book. He can stand up and just discuss some of the basics in five minutes.

Plaintiffs' counsel say that we're sandbagging them but plaintiffs' counsel in fact have brought their ESI expert to hearings without telling us previously.

MR. McINTURFF: That's inaccurate. That's not true.

MR. FIOCCOLA: It's not inaccurate.

MR. McINTURFF: It's not true. It's a lie. It's not true. You're misrepresenting to the Court.

MR. FIOCCOLA: That is not inaccurate. At the end of the day, if you don't want to hear from him, that's great, your Honor. You'll hear from him in our opposition. But I just think that it's good and possibly could save some of the Court's and the parties' resources here.

THE COURT: Look, he's here. I'm happy to hear from him. I'm not making any decision today so if he wants to say what he wants to say -- you're going to file your motion and if you want to have your own expert submit an affidavit, that's fine, too.

MR. McINTURFF: Judge --

THE COURT: They're going to be allowed to make the motion so if you still want to have your expert explain whatever you want to explain, that's fine.

MR. FIOCCOLA: I think five minutes will be beneficial and instructive.

THE COURT: That's fine. I'm happy to hear from you.

MR. MCINTURFF: Over objection, Judge.

THE COURT: Understood.

MR. COHEN: How could I not say something after that? I think counsel has sort of alluded to what I would say, leaving aside all the lawyer arguments and just sticking with sort of the research and the science aspect of this. The use of predictive coding has been -- the reason it has been approved by the courts and the reason that there are so many cases where plaintiffs have demanded that defendants use predictive coding is because it is so well-established by the research that it is more accurate than other ways of finding information.

What we are looking at is this theory that, if an attorney reviewed it, then you're going to get a better production, but that's precisely the opposite of what all of the tests that have been done by government groups, by technical groups over years and years have found. So that would be the position.

THE COURT: Do your clients know that and do they still continue to agree to pay $600 an hour for some first-year associate to review documents? It's just a question.

MR. COHEN: The trend is towards use of the technology. Of course, it's not even as new as it was

back in the days of DeSilva six years ago or something. In fact, it motivated -- I know this because I was involved in some of the rule-making process for the amendments to the federal rules and Federal Rule of Evidence 502. Those changes were motivated by the desire that litigants use this technology more because it is so effective.

MR. FIOCCOLA: Thank you, Adam.

THE COURT: Thanks. I'm not deciding anything at this point. There's nothing to decide. If you want to file your motion, you can file your motion. To the extent that there are things that you've offered to do that they don't want you to do that would have revealed whether or not there's any prejudice, I guess we'll deal with it. I'm not going to force them to do something that they don't want that's an extra burden on you. If failing to do that means that they can't establish prejudice, then you'll put that in your motion and it's their loss, I guess.

MR. McINTURFF: On that front, we'd at least like to have this motion covered by the standard federal motion rules instead of the five days and three pages because this issue is going to take more than that.

THE COURT: That's fine. That's why I

suggested a briefing schedule as opposed to just the normal file your motion whenever you file it.

MR. McINTURFF: We'll work out a briefing schedule with counsel.

THE COURT: Okay.

MR. FIOCCOLA: Thank you.

MR. McINTURFF: This next issue is the call recording samples that were initially ordered during the June 14th conference. We've had some rolling productions but it's taking way too long and we need the Court to set a firm production deadline. There are a number of outstanding calls still owed, so that's issue number one. And two, despite many attempts to get an understanding from Cross Country regarding 77 customers in its initial production who -- the company had records that they contacted the company but they didn't produce any calls for them. We'd like Cross Country to give us an explanation. We haven't been able to get an explanation through the meet and confer process so we'd like one here. And, again, a firm date for production of the remaining call recordings.

MR. WITTELS: Just so your Honor is clear on what the volume is, there were three categories of calls that they were to produce. The first, we finally got the rest on Friday, which was a hundred calls for

people who terminated being billed within the last year. The other two groups were supposed to be fifty calls, the first one being nonpayment was the code and then BVNLA, billing vehicle no longer available. That was the other code so they called it group three. On group two, the nonpayment, they produced eleven total out of the fifty. On the other, they only produced for six for BVNLA. So that's what's still lacking, almost 190 or 87 calls still owed.

MR. McINTURFF: Just so your Honor understands where we are in the process, last week, they produced their latest production and so it's now plaintiffs' turn to provide Cross Country with additional account numbers and we can do that promptly. The issue has been that it's taken so many months to turn these around. We'd request that the Court enter a deadline. Let's wrap this up in the next few weeks because it's taken now more than two months.

THE COURT: Is the one where they have to check the numbers and not all of them are still there?

MR. McINTURFF: Correct.

MR. OFAK: Yes, your Honor, if I may. When you originally ordered us to do this, we explained in detail that this is a very onerous process, incredibly burdensome. We have been complying with your order.

Your original said that the plaintiffs would choose two hundred documents for each category or two hundred contract numbers for each category. For each contract number, we would look to see whether there were any calls for those contract numbers. And to the extent that we found them, we would produce them. We did that for the first round of two hundred for each category.

Plaintiffs provided us with a second round of numbers. It's unclear whether we were actually required to look for those additional contract numbers but we agreed to do it in good faith. But at this point, we've looked through over 1,100 customer contract numbers. The calls are what they are. We're going through and we're making sure we didn't miss anything in the archives. We should have that done in the next two to four weeks. At that point, we believe that we've satisfied the Court's order.

MR. McINTURFF: No, you need to finish and produce.

THE COURT: I thought I had ordered a hundred of the more recent ones because they were on a more easily accessible format and fifty for each of the other ones.

MR. OFAK: Your Honor, I believe your order stated that it was a hundred for the first, fifty for

each, but we would get to that fifty by reviewing two hundred contract numbers that were randomly selected by the plaintiffs.

MR. McINTURFF: Your Honor, we're not here on a motion for relief from your prior order. Essentially, that's what counsel is making here. They need to comply with your order. They have taken months to do it. They complained -- they use burden as an argument to object to our discovery requests. Your Honor overruled their argument and they need to comply with the order. We're not here to renegotiate what your Honor's prior order was.

MR. OFAK: Your Honor, I'm not trying to renegotiate the order. Like I said, it was a bit unclear from the order based upon what we were required to do. Our understanding was that it was (ui) two hundred contract numbers for each category, and then after we did that, produce the calls for the first fifty contracts. As we stated, a lot of these contracts aren't going to have any calls associated with them.

So what we found was that we went through the six hundred contract numbers and there weren't, with respect to categories two and three, fifty contract numbers with calls. In good faith, we also

looked through an additional six hundred documents. At this point, we're up to 1,100 customer contracts that we've been looking for calls and it's incredibly burdensome.

MR. FIOCCOLA: We should point out that group one, we've been able to identify a hundred at this point. Those are the more recent ones that you were just discussing, your Honor.

MR. WITTELS: So we'll produce another randomly generated set of numbers for group two and three, Judge. And when they get to fifty, they've met their obligation. It's that simple.

MR. FIOCCOLA: I think it really comes down to how many iterations do we have to do because we're finding -- out of the two hundred, we're finding three, four, five contracts that actually have extant call recordings.

THE COURT: And there's no way to figure out ahead of time?

MR. OFAK: No, your Honor, it's a manual process. We have to go to the contract numbers. We have to look at whether, with respect to that contract number, there was a call, and then we have to go and try to find those calls. It's a very arduous process. As I said, we've gone through over 1,100 documents. It

has taken a lot of time but we've been diligently working on it. There are multiple people at the company working with us to try and gather this information.

MR. FIOCCOLA: We also have -- I think the part of this equation that's being left out is that when the call recordings were originally requested about a year and a half ago at this point, we identified that it was going to be a very arduous process to go through and identify them. What we said instead, which will in our view get you to the same place, is that we have a database of notes from the people who take notes when the calls apply.

We produced those for each of those as well and for those that we have, we're producing those as well. I think those are a suitable alternative at this point, given the amount of effort that has been expended for very low turnout on the call recording. I think this is exactly what the proportionality section of Rule 26 gets out.

THE COURT: Why were there so few calls?

MR. OFAK: Your Honor, not every contract number has calls associated with it. People may just not call. So the plaintiffs are randomly selecting calls --

THE COURT: So they're just randomly putative plaintiffs.

MR. OFAK: Yes.

THE COURT: And you're going in and seeing whether or not there were any calls. And there's no way to identify the reverse. In other words, can you look in your thing and see who made calls and then just randomly pick fifty of them?

MR. OFAK: Your Honor, plaintiffs are seeking calls associated with specific codes. I believe this was discussed at greater length at prior conferences. They're seeking calls that are associated with specific cancel reasons, so I don't know how that would be done in the reverse.

THE COURT: I don't know. I'm just trying to figure out if there's an easier way to do it. The ultimately goal is they want a sampling of fifty calls from those two categories.

MR. OFAK: Fifty from each.

THE COURT: Fifty from each of those two categories. I understand that the way you're doing it this way, where they identify a random number and you have to go through and see whether there are any calls and then get them -- that seems fairly onerous. Is there a simpler way of getting fifty calls?

MR. OFAK: Your Honor, plaintiffs have represented that they are trying to use some sort of statistical sampling. That's not anything that we can do on our end.

MR. WITTELS: It has to be random, Judge, in terms of how the numbers are generated, rather than just going through and picking calls. It might infect the statistical process. We'll keep going but that's how --

MR. McINTURFF: As your Honor has pointed out --

MR. WITTELS: Look, it took a long time for them to give us the first fifty users.

THE COURT: If they have to look through two hundred to get one or two, that's why it's taking so long. It's not as simple as -- if they could pull fifty and give you fifty, then I think we'd be -- it would be a different story.

MR. OFAK: Right.

MR. PREVIN: Your Honor, if I may. On behalf of Ocwen, it's sort of a staged process. Once Cross Country identifies the calls, the accounts where they have calls, plaintiffs want Ocwen then to produce any calls it has related to Cross Country from those same customers. We're in the process of doing that.

Obviously, we can't do it concurrently because we don't know -- there's no way for us to match up the Cross Country account number with the Ocwen loan number without -- we have to wait for Cross Country to produce its -- the ones who have their calls and then after that, we do ours. So we're several weeks behind in the schedule.

But what we found from -- now it's been about six weeks after Cross Country produced its first batch of sixty-something I think it was. We're in the process of collecting those calls. We're finding -- this isn't particularly surprising. We have a couple of thousand calls just from those sixty customers. I'm not in a position to say how many of them relate to Cross Country because we're going through them, but my expectation is that it will be a tiny fraction because people are calling about the mortgage, they're not calling about --

It's an average of over thirty calls per account. Extrapolating sort of down the line -- it's very time consuming both to collect the calls and then to review them. We're talking about a burden that will require Ocwen to review thousands of call recordings for -- without even knowing whether any of them relate to Cross Country.

MR. WITTELS: Judge, this is the key to the case in many ways because had Cross Country and Ocwen paid attention to the calls in the first place, maybe they would have stopped a long time ago. We've asked all the people at Cross Country if they listed to phone calls and it was amazing to hear that not one person said they ever listened to any phone calls from anyone complaining. The person in the retention department, the head of the retention department said he didn't even listen to calls, which we know is not true from other people in the department, but it was amazing.

I feel somewhat sympathy for the lawyers but I feel no sympathy for the client because they brought this on themselves. That's why this lawsuit is here. They didn't want to listen to the calls so now people are listening to them, and we're going to show them to the jury so the jury can use them.

MR. McINTURFF: If I could just add, your Honor, this is falling on the heels of -- we got calls for a sample group of customers who had used the plans, supposed happy users. If your Honor remembers, 77% of those people called up and expressed that they didn't know what was going on. This is very key discovery. As your Honor has ruled in the past, this is a problem of defendants' own making. We've already -- we're

already narrowing it down by doing sampling. We're not requesting all the calls.

THE COURT: Look, I'm not going to change the number of calls but I think under the circumstances, you're just going to have to give them more time. I'm to going to impose a strict deadline when it's obviously an onerous process. Frankly, they don't know how long it's going to take because they don't know how many random numbers you're going to have to generate before they get the requisite fifty.

MR. WITTELS: Fair enough.

THE COURT: All I can ask is for them to continue to diligently do what they've been ordered to do. But I'm not going to tie their hands to a particularly time period, given the uncertainty of what they actually have to do to get it.

MR. WITTELS: Okay, your Honor, thank you.

MR. McINTURFF: If we can have an explanation -- I'll give some background. In Cross Country's initial production of this set of calls, they said that they had gone through six hundred accounts and that they were producing call recordings for 66 accounts and there was no record of telephonic contact for 457 of the accounts. So when you do all the math, that means there was a record of telephonic contact for

77 customers but they didn't produce the calls. We asked them to explain this in the meet and confer and we still haven't gotten an explanation. So we need an explanation as to why they have a record for 77 customers having called but they don't have the call or they didn't produce the call.

MR. FIOCCOLA: The answer to this is rather simple and I thought we had provided this to them. I feel like I've been on a phone call where we provided this to them but perhaps not. It's not there. Where we identify calls and we identify that we still possess the record of the call, we have produced them.

THE COURT: Okay. So when you say that there's a record that there was a call but you no longer have it, are those call logs that you were talking about?

MR. FIOCCOLA: Correct. So we can identify from a call log that a call was received or made but we don't have a record of a recording of the call. We just don't have a record of the actual audio of the call. Where we have them, we produced them. Where we don't have them, we can't produce them because we don't have them.

MR. OFAK: I'll just add one additional point to that, your Honor. Again, some of these calls

are going back a number of years so it's a manual process to go (ui) in the archives and trying to locate them diligently and reasonably. Some may not have been saved and recorded.

MR. FIOCCOLA: It was my understanding the question to us was, why don't we have them? In a perfect world, for anyone who watches Game of Thrones, perhaps I could go in the warewood (ph) tree and go check out what happened. Unfortunately, we don't have that ability. We just don't have them.

THE COURT: I don't know that anyone has ever compared Game of Thrones to a perfect world before but --

MR. FIOCCOLA: Fair enough.

THE COURT: I take your point. Anything else?

MR. McINTURFF: Yes, your Honor. We have a dispute regarding the contact performer employees. We issued document requests for employees who are no longer employed at both Cross Country and Ocwen. Through the meet and confer process, we negotiated certain productions. We got a production from Ocwen with the contact information that they had. Cross Country, on the other hand, is objecting to producing contact information for former employees who were hired

after the lawsuit was filed.

They are agreeing to give us information -- contact information for former employees who were hired prior to the lawsuit but they're saying that it's not relevant or discoverable, this contact information for employees hired after the lawsuit. It's not burdensome. We're just asking for phone numbers and email addresses and we think that their objections are groundless and that it's --

THE COURT: I think we've established that filing of the lawsuit is not the relevant -- not the touch point for relevance in this case, so why is that -- not to say that there's not a whole bunch of employees for the company that would be irrelevant but why does it matter whether they were with the company after the lawsuit was filed or not? Why is that the --

MR. OFAK: Your Honor, we just don't think they would have any relevant information.

THE COURT: You might be right on an employee by employee basis but I'm not sure that that in and of itself is a reason not to do it. I guess, for example, if you have customer service people who were receiving phone calls during the period post-lawsuit, at least under plaintiffs' theory, that person might have relevant information.

I know you disagree about whether or not that's relevant but under their theory, that person would conceivably have relevant information if they were fielding complaints from customers who were still being billed even though it's post-lawsuit. It's just an example. I would think that there's probably a large category of people that might not be relevant but there might be some that are, and I'm not sure that post-lawsuit or pre-lawsuit really is the defining feature.

MR. McINTURFF: Just to add, your Honor, we only asked for a narrow -- we didn't ask for all their former employees. We asked for a narrow subset of employees who were -- I don't want to get too much into work product but largely people in customer service.

THE COURT: Okay.

MR. McINTURFF: Not exclusively but --

MR. WITTELS: And we have -- yeah. I just don't know why they're not producing them. We've already deposed one witness who we had ready for trial, Steve Wilkins, and he was after the lawsuit started.

THE COURT: I don't see any reason not to produce it. I'm not saying they're going to necessarily be able to use any of these people but I think at least for discovery purposes, they can contact

them and see if there's any relevant information there.

MR. OFAK: That's fine, your Honor, we'll produce it.

THE COURT: Okay.

MR. FIOCCOLA: If we can have a deadline for production.

MR. OFAK: Labor Day is coming. The following Friday after Labor Day?

MR. FIOCCOLA: That's good.

THE COURT: The 15th?

MR. OFAK: Yes.

THE COURT: Okay.

MR. TEPFER: So, your Honor, using that same logic, does that mean we get to depose the other plaintiffs, if we could revisit that issue now.

MR. WITTELS: We're not done. We can come back but there's a few more things.

MR. McINTURFF: The next item on our list is, we continue to be blocked with our request for information related to Cross Country group's ESI. We really think that your Honor already cleared this up. We issued a subpoena to group in late 2016. Group secretly restricted the date range of its production to December 31, 2013. Your Honor ruled -- we have the

quote from the record. Strangely, defendants are -- they say that the transcript is not a ruling from your Honor and that the minute entry doesn't reflect any ruling, so they're refusing to update their production. We thought it was clear but I guess defendants don't believe it's clear, so we need more clarity.

MR. FIOCCOLA: Your Honor, I'll just say first of all, on this particular issue, I do think that the transcript -- that was a statement, it was not an order that your Honor made based upon our reading of it. I wasn't at the hearing. I read the transcript, I read the minute entry. I spoke to who was at the hearing and no one believed that that was an order that your Honor made.

We stand on our time frame that was -- they claim that it was surreptitiously done but we provided them the metadata, we provided them everything. It was clear what --

THE COURT: I don't understand why you limited it to that time period.

MR. FIOCCOLA: We went from -- I can't remember the start date, until the end of 2013 because that was the time frame that we had seen any action on this from anyone at Cross Country group, within the Cross Country Home Services frame. After that time,

everything that we've seen is only privileged documentation. If your Honor is going to order us to produce it, you're going to order us to produce it. Wee don't think it's relevant. We stand on our objections but we'll do what your Honor says on this at this point. The remaining points, B through --

THE COURT: If it's privilege, obviously, you don't have to turn it over but --

MR. FIOCCOLA: Of course, but it's sort of a proportionality and a burden issue to begin with. First of all, let's start off with the concept of what the Cross Country group production is. The Cross Country production -- plaintiffs came here a few months ago and stated that there were vast problems with it because we only produced 340 documents. That basically completely avoided the fact that Cross Country group does not solely do work for Cross Country Home Services but in fact does work for over twenty other companies that are all owned by the same family.

The primary -- most of these documents -- we have reviewed a ton of them and I'll walk through exactly what we did in just a minute. Most of these documents have nothing to do with Cross Country Home Services. In fact, out of the documents that came back from the search terms, only about 6,000 of them

actually have Cross Country Home Services or some variation of that or variation of the domain name even within those documents. On top of that -- we reviewed every single one of those, by the way, in response to plaintiffs' concerns about the purported deficiencies in our production.

Additionally, we reviewed another 6,000 documents that we added some documents that plaintiffs identified. They wanted us to go back and look for certain documents. We found some documents that had Jpeg images in them so they wouldn't have been caught by search terms, either. There were four or five of those and we plugged those back in and we reran the algorithm and about 6,000 additional documents came back as responsive versus non-responsive from the previous run. We reviewed every single one of those documents. We reviewed every single document that came back that had CCHS or some form of that that hadn't previously been produced. If it had been reviewed but not produced previously, we reviewed it again. That resulted in a little under 12,000 documents. Sixty of those documents were responsive. Fifteen of those were privileged. All of those privileged documents came after the institution of this lawsuit. All but I think one came after the institution of this lawsuit and all

were about this lawsuit. So our focus here isn't just some willy-nilly cutoff.

Additionally, they take issue with -- they say that we haven't --

THE COURT: So you reviewed documents up to the date of the subpoena, or you only reviewed documents through December --

MR. FIOCCOLA: No, we only reviewed documents through December 13 for this particular issue.

MR. McINTURFF: If I can also add, your Honor, a little bit more context. We issued the subpoena -- we negotiated search terms. We agreed that the parties would use two sets of previously negotiated search terms. Mr. McElroy's counsel, Mr. Alexander, confirmed on the record in front of your Honor that they were going to be using both sets of search terms. Then they produced three hundred documents. That's when we found out that what they actually did was used one set, not two sets of search terms, that they produced as of December 31, 2013, not as of the date of the subpoena. They then used predictive coding, which they hadn't disclosed to us previously. Also, one of the two sets of search terms returned 60,000-some documents.

Counsel made this representation that they reviewed documents and so many of them didn't even have the words Cross Country Home Services in it. That's completely irrelevant, that's a total red herring. They're talking about check solicitations. The search terms are designed to recall documents about check solicitations. People don't we're Cross Country Home Services in their emails necessarily when they're talking about this.

So 60,000 were recalled by one set of the search terms when they were supposed to use two. They did predictive coding. Then after they did predictive coding, which is unprecedented, without disclosing it, then also unprecedented -- after they did the predictive coding, they reviewed documents and then only produced three hundred documents. So that's the real context. This stuff about, we reviewed so many documents, first of all, it's premature, it's going to be the subject of our sanctions motion. And secondly, we're just dealing with the -- this is the first issue. It's just the date. The date should be the date of the subpoena. It shouldn't be December, 2013.

MR. FIOCCOLA: I disagree with the characterized of what search terms we agreed to. I have an email where I stated specifically, we're using

the last agreed-upon search terms. If that was ambiguous, I didn't think it was. If it was ambiguous, I didn't get a question about it. I apparently wasn't at this hearing that Bruce stated we were using both agreed-upon search terms but my suspicion is that he said that after we had already done it and that he misunderstood based upon a conversation with me.

I have to look at that transcript. I don't know. I've asked them before which search terms they thought we didn't use and they haven't identified any of this transcript information to me. They simply said that they thought we meant every search term that we had previously agreed to, which I said, that's not what we said.

MR. McINTURFF: Why would agree to a narrower list of search terms if we had --

MR. FIOCCOLA: You agreed to narrower search terms before.

MR. McINTURFF: We would never have done that. It's just completely inaccurate. They misled us through the entire process.

MR. FIOCCOLA: I think the accusations of misleading, deceptive character, I think crooked was used earlier, are really not necessary here. I think that we can have a dispute on professional terms.

Having said that, I think that we were fairly clear about what we were doing. They obviously don't. At the end of the day, if your Honor wants us to produce up to the date of the subpoena, we'll go back and do it as ordered. But I thought we made it clear the time frame we were using and the objections. We made relevance objections just like we did to everything else for these purposes that we have argued about time and again on various issues. This is a third party, this is not an actual defendant. At the end of the day, I don't think we need to spend an hour arguing this.

THE COURT: I think -- I still don't really see any good limit the response to that time period. Obviously, if it's privileged documents, you don't have to turn them over. Otherwise, I think -- I don't think you can categorically say everything past that date is irrelevant when you admitted you haven't reviewed it. Review it for relevance, and if it's not relevant, then don't produce it. I don't think you can come in here and say, we predict that it's going to be irrelevant but we haven't reviewed it.

MR. FIOCCOLA: Okay.

MR. McINTURFF: The next issue, your Honor, is --

THE COURT: Maybe in a different case, you could make that prediction. But in this case, there's obviously some relevant information that's occurred post-lawsuit, so I don't think you can just presume that anything that's post-lawsuit is not relevant.

MR. FIOCCOLA: Thank you.

MR. McINTURFF: The next issue is, we're trying to have the ESI search conversation with groups and we're trying to get an idea of where their potential locations of electronically stored information are. So we keep asking them, tell us all of the places where you have ESI and we keep getting this response, which is, we're searching all locations for responsive documents. That is not the question that we keep asking.

We want to know what they have and what they're searching and what they're not search, so that we can understand whether or not what they're not searching is proper. We've asked this five different times. This is now the sixth time that we are asking Cross Country group to tell us specifically everywhere it has ESI and to tell us what it is searching and what it is not searching. Frankly, I don't understand why they can't tell us that and why it's taken six times.

MR. FIOCCOLA: Your Honor, frankly, I don't

understand what more they want from us other than what we've told them. We had conversations with them a few times where I identified that the company, Cross Country Group, maintains one shared server which is used by company employees. There aren't that many company employees. So we identified that we would review the shared server. I identified this to them on the phone. I have an August 1st email I sent to them which they reference in here, where I also stated that.

We also stated that the individuals have personal computers and we stated we would be searching personal computers for relevant information. We also stated that the individuals have cell phones which would be searching for relevant information as well. The last update, I told them that so far, we have not identified any responsive information in any of those sources, that we would supplement and identify to them if and when we did. I haven't heard back from them from that August 1st email, except for this letter that we received yesterday for today. So I asked them previously --

THE COURT: Let me ask you, though, what does that mean exactly, you haven't found anything yet? Does that mean you've done the search or that you've started the search but you haven't finished it yet?

MR. FIOCCOLA: We have not completed the search, as far as I'm aware. We are searching the shared file folder. I know that. There's in-house counsel. I'm working with him closely to search the relevant locations. The last time I checked with them, which was prior to the August 1st email, they had not completed the task but they had begun the task. I asked them --

THE COURT: Here's what I want you to do: Get in touch with them, find out what the status is. Are they still doing the search, roughly how far are they into the search? Have they done 50%, 70%, just so that plaintiff has some idea where you are.

MR. McINTURFF: If I can add, your Honor, counsel -- I assume you just forgot to mention that you're searching their email accounts.

MR. FIOCCOLA: We've already searched their email accounts. That's what the production primarily was and that's what our conversations were originally. So yes, the email accounts have been pulled for specific custodians.

MR. McINTURFF: Okay.

MR. FIOCCOLA: Originally, it was four custodians. We've agreed to two additional custodians at this point.

THE COURT: Okay.

MR. McINTURFF: So if we can have, your Honor, because we haven't gotten written response from the defendants stating all of the sources of their ESI and what they're including and what they're leaving out. We'd like them to give us that in writing.

MR. FIOCCOLA: I don't know what else I can do other than what I put in the August 1st email, which is -- do they want the name of the shared file folder, do they want the serial numbers of the competitors that people are searching? I just don't know what additional information other than the custodians who have personal -- not personal computers but work computers that have separate, non-network storage and then network storage. Those are the types of storage that the company has and that's what we've reviewed. We've also said that we're reviewing their cell phones for text messages or any other types of data. I don't understand what additional I can provide to them other than getting down to the nitty-gritty of the serial numbers of the server box or something.

MR. McINTURFF: We're not asking for that. We're just asking for it to be written in one place in case it turns out that there's some other ESI that they -- we want them to go on record about --

THE COURT: I think he just did.

MR. FIOCCOLA: And it's in the August 1st email that I sent to them.

THE COURT: You can get a transcript to this. I think he's laid out pretty clearly what the databases are.

MR. McINTURFF: Fair enough.

MR. FIOCCOLA: To that point, just to clarify, to be clear, the company does not maintain a database of information.

THE COURT: Okay, the server --

MR. FIOCCOLA: Because that was one of the additional questions, too. The server is just a standard network server.

THE COURT: It's a network server and then each of the custodians has their own personal computer that has a non-network drive that's also being searched. That's correct?

MR. FIOCCOLA: Correct.

THE COURT: Okay. And their own person or business cell phones.

MR. FIOCCOLA: Yes.

THE COURT: Okay.

MR. McINTURFF: The next issue is -- counsel alluded to this. Group's ESI custodians have offered

to review their cell phones for responsive text messages. We just need an update on when this review will be complete.

MR. FIOCCOLA: Again, I'm happy to provide an update. Just to be clear, what I stated in my email was that nothing had been identified to date and if we do identify anything, we will let them know. I will make double sure that --

THE COURT: I don't know what that means. Does that mean you've done the search and you didn't find anything or does that mean you started the search but you haven't finished it yet?

MR. FIOCCOLA: As of July and as of the point that I sent this email, we had begun the search.

THE COURT: Okay.

MR. FIOCCOLA: At that point --

THE COURT: You haven't found anything yet.

MR. FIOCCOLA: -- we hadn't found anything yet.

THE COURT: Okay.

MR. FIOCCOLA: To this point, it is still my understanding that nothing has been found because I have not been told otherwise.

THE COURT: Okay.

MR. FIOCCOLA: That's sort of the --

THE COURT: Double-check with your client and find out what --

MR. FIOCCOLA: Without getting too much into it, that's just the plan that we had.

THE COURT: -- where you are in the process. Is it 50% done and they still haven't found anything?

MR. FIOCCOLA: I will provide an update.

THE COURT: Where are you?

MR. FIOCCOLA: Yes.

THE COURT: What's next?

MR. McINTURFF: The next issue -- just to be clear, for C, now that the number of ESI custodians is six, we'd ask that the two additional custodians also has their cell phones reviewed for text messages.

MR. FIOCCOLA: It is my understanding that that is occurring or has occurred. I will double-check on that as well.

MR. McINTURFF: This is background but in the document production, in Cross Country Home Services defendant's document production, there are emails from some of Group's custodians where they're sending emails to certain of the Cross Country custodians and they're using their personal email accounts. We requested first whether there were any additional email address that Group's custodians were using. We got a response

saying that we're looking into it and we'll provide you that information.

Then we got this cryptic response of, we haven't identified any emails used for CC group business other than those identified in their production. So they're telling us that the only emails are the ones that we show them. We think that in reality, it's evident that these people are using their personal email in conducting Group's affairs. And in light of their inability to give a clear response to our request that they tell us whether or not they're using any other email addresses -- because we obviously know they're using at least two. We think that it's time now for the Court to order them to search the personal email accounts of all four custodians, or I guess it's six now.

THE COURT: Because two of them have used personal emails?

MR. McINTURFF: Because two of them have used it and we have proof it, and they won't even give us a straight answer about whether these two have used additional email accounts. They're basically saying the only two emails are the ones that you showed us.

THE COURT: Are they saying the only two emails or the only two email accounts?

MR. FIOCCOLA: Only two email accounts.
THE COURT: That's what I thought.
MR. McINTURFF: Okay.
MR. FIOCCOLA: Yes.
MR. McINTURFF: Then we have a misunderstanding. I misread that. If it's just the email accounts --
MR. FIOCCOLA: That's what I thought the question was about.
MR. McINTURFF: If it's just the email accounts, then those email accounts need to be searched. They're conducting business from personal email.
MR. FIOCCOLA: I think that there are two or three documents that have been produced that have these emails in them. I think the same reason that your Honor issued a protective order against taking the depositions of these individuals apply for going into their personal emails. The review, which had the custodial email accounts, produced very few emails to begin with that related to Cross Country Homes Services or the check program. I just don't think there's a basis to go into these individuals' personal emails. It hasn't been shown based upon one or two emails that were used, personal email.

THE COURT: I don't know what those one or two emails were. Were they important documents?

MR. McINTURFF: I don't have them in front of me, your Honor. They are related to the case and obviously caught our attention.

MR. FIOCCOLA: I also think this isn't really -- this is an issue that shouldn't be decided informally. If this is going to be decided, I think a formal motion to compel should be filed and we should be given opportunity to brief the issue and specifically address why they believe the personal emails are to be used or should be searched. Again, these are nonparties. Effectively, they're contract employees. They do a board of advisors a few times a year for --

THE COURT: This is also the reason why usually, companies instruct their employees not to use personal emails for company business. If they used the emails they were supposed to, you wouldn't have this problem. I'm not saying it's your fault but --

MR. WITTELS: We might have a different president.

THE COURT: Don't get me started on Twitter. Without knowing what the context of those emails are that's in the private accounts, I'm not really in a

position to rule on that at this point. See if you can -- now that you understand what it is, it's those two email accounts that have been used, see if you can sort that out amongst the parties and decide if there's some parameters that you can set. If not, then you're going to need to set it out a little bit more for me before I determine whether or not to search personal email accounts for nonparties.

MR. McINTURFF: Okay. The next issue I think we've gone over. We just need an update of when these two additional custodians' accounts are going to be collected and produced. This also raises an issue regarding whether or not they're going to use predictive coding again. We would ask that for these email accounts, at least these two where they haven't used predictive coding yet, they just produce the documents that are recalled by all of the search terms, which is what was agreed to, and that they produce responsive documents, that they not be allowed to use predictive coding again.

MR. FIOCCOLA: First of all, we never agreed to produce all documents which hit on search terms. We would have fought much more about the expansive set of search terms if that had been the actual agreement, but that was never agreed to.

MR. McINTURFF: Just to be clear, I mean responsive, in accordance with the ESI protocol.

MR. FIOCCOLA: With respect to these, I thought that I had informed you that we already collected them. We're in the process of reviewing them. We did the other review first, which we produced a document production of 45 responsive documents along with non-responsive family members I think two weeks ago. I was on vacation. I can't remember the exact date that it went out. We worked on that for a while. We got through that. Then we stuck the Sid and Jeffrey Wall documents on the back end of that and we're in the process of reviewing that.

There are about 12,000 total documents that hit on the search terms. We have, according to my review team -- I asked this morning for an update. We have finished about 4,000 of those documents. We have had a lot of vacation time taken by our review team in the month of August, which I think is sort of natural. At this point, of the approximately 4,000 documents reviewed, we have not identified a single responsive document.

MR. McINTURFF: Have you done predictive coding on the --

MR. FIOCCOLA: No, we are reviewing them

linearly. With only 12,000 documents, there's not really cost savings.

MR. McINTURFF: And you applied both sets of the parties' search terms?

MR. FIOCCOLA: I applied the same search terms that I used before.

MR. McINTURFF: Okay.

MR. FIOCCOLA: If you want me to use the other search terms, that's fine, let's talk about it.

MR. McINTURFF: Okay, we can discuss that.

THE COURT: Okay, next issue? Why do I feel like this is part meet and confer?

MR. FIOCCOLA: These items have not been brought up with me since my August 1st email. We could have taken care of a lot of this just through a simple back-and-forth email.

MR. McINTURFF: We're almost done. This last one is, we need an explanation, which we've requested a number of times, on why Group doesn't have emails prior to 2011. In June, we were told that Cross Country is following up on it in early June. Then in late June, Cross Country agreed to identify and disclose Cross Country Group's pre-2011 backup practices, and they still haven't responded to us.

MR. FIOCCOLA: First of all, we have

produced documents prior to 2011. It's a little bit of a background. The company -- plaintiffs' counsel know this. The company did not start archiving until 2011. That's why we go back to the archive. It started archiving in 2011. So at that point, anything that existed when the first archive was made is what exists.

THE COURT: Okay.

MR. FIOCCOLA: We've had this discussion a few times. Go back and provide pre-2011 backup practices. It's my understanding that the company did not start archiving until 2011, so I'm not sure that there was a backup practice. I've asked about this quite a few times and we've had this conversation quite a few times. If what they want us to say is that the company didn't archive prior to 2011, I can say that right now. They didn't archive prior to 2011. I don't know what else can be said about this.

THE COURT: So in other words, if it still existed at the time that they started archiving, it would be there.

MR. FIOCCOLA: That's correct.

THE COURT: But if it wasn't there at that point, they wouldn't have preserved it.

MR. FIOCCOLA: That is correct.

THE COURT: That's why the pre-2011 stuff is

hit or miss, essentially.

MR. FIOCCOLA: That is correct.

MR. WITTELS: Judge, I think that's really the end of today in terms of disputes. Rather than set any kind of deadline now, I'd like to suggest -- obviously, this is subject to hearing from defendants -- that we work out the briefing schedule on our motion. There may or may not be other related motions. There are obviously some followup points here, and we come back on that date. Because it's hard to get dates when we call, maybe we can pick a date now and hopefully work towards that date.

Then your Honor maybe can -- I don't think now is the time to talk about the discovery cutoff date, given that we don't have the motions decided. We're going to have more motions and defendants are still producing discovery, and they want discovery from plaintiffs. Why don't we revisit the issue of the plaintiffs' depositions. We'll come back in six weeks. We should have the motion briefed by then and we can hash out due dates then. Maybe Judge Garaufis will have ruled on one of the motions by then or at least the first motion.

MR. TEPFER: Judge, I think we do need at least -- if you recall, back I think it was April, I

was advocating for a longer discovery period, the end of September.

THE COURT: Yes, I remember.

MR. TEPFER: And plaintiffs' counsel was arguing for a shorter one, the end of July. Some of these issues, at least the call recordings and that kind of stuff, had already surfaced, and I thought I had argued very vehemently for a longer period. I don't have an objection to a longer period now but it shouldn't be open-ended. We should have a date and if we need to revisit that date as we get closer to that date, we can do that. But I don't think we would agree to an open-ended discovery period. I think that's inconsistent with how we've been proceeding in this case.

But if you wanted to do the end of October or the end of November, three months, and allow us to take the plaintiffs' depositions within that time frame, I think we'd be amenable to that. I think the sanctions motion will be briefed before the end of that period. If we need to revisit that deadline based on any lingering issues, we can do that. But I think we need to have a firm end and if we need to extend that as needed, we can do that. But I think part of that also means that we get to take the plaintiffs'

depositions during that period.

MR. WITTELS: Can I talk to counsel, please?

THE COURT: Yes.

(Off the record discussion.)

MR. TEPFER: Your Honor, just to add one other point that co-counsel reminded me, that would be the end of discovery and then expert discovery might extend.

THE COURT: Yes. It will be conclusion of fact discovery.

MR. WITTELS: Judge, I think our suggestion from the plaintiffs' side is more workable, to give us a date in mid-October or towards the end of October for this next motion. We come in, we see where we are in terms of setting dates. There's no point in setting a cutoff when it's obviously going to be -- we're never going to finish it by -- it's unlikely that it's going to be the end of the year, maybe. It depends how quickly the judge rules and we get the discovery that we need. We have other depositions we have to take, Howard Walk (ph). We need to get Incandella (ph).

THE COURT: I thought Walk was supposed to be deposed months ago.

MR. McINTURFF: We held off on Walk because Walk was when we found out that Cross Country Group had

used predictive coding and that's why we didn't have any documents from Walk. So we deferred Walk, we have deferred Walk pending the resolution of the predictive coding issue because how the predictive coding issue is resolved by your Honor is going to affect what we do afterwards and whether there's more or less discovery. So that issue is sort of in limbo at the moment.

MR. WITTELS: The motion we made earlier about the board of advisors -- your Honor quashed the subpoenas subject to our renewing it depending upon what shows up A) in the discovery and B) perhaps in the deposition of Walk. We have to do Walk, Incandella, Tammy Throng (ph). I would suggest that we come back -- discovery will be ongoing. We come back for that motion and we'll be in a better position to see where we're at. If we can get a date say after the 18th of October?

MR. McINTURFF: It depends on how long they're going to need to respond.

MR. WITTELS: I think if you set it for towards the end of October, they will have had time to brief this and we'll be back and now where we are by then.

MR. PREVIN: Your Honor, Ocwen really does think a discovery cutoff is appropriate. If at the

resolution --

THE COURT: Here's what I'm going to do. I'm setting a discovery deadline of December 29th. I think that's more than enough time to brief whatever you need to brief and deal with some of these issues. If as a result of ruling on any of these motions, we need to extend that deadline, then I'm happy to extend the deadline if that's necessary. I don't want to keep it open-ended. I think that just invites years and years of endless litigation. So let's try to keep to the schedule and to the extent that we need to revise it, I'm happy to do that. I think everyone should have a target date in mind to try to aim for at least.

MR. TEPFER: Judge, that sounds good to us. Just so we're clear, we'll be able to depose -- we'll be able to take the depositions of those remaining plaintiffs during that period.

THE COURT: Yeah, before December 29th.

MR. TEPFER: Great, thank you, Judge.

MR. WITTELS: Judge, with the caveat that, as your Honor said at the beginning, if for some reason we get rulings on the other motions and it becomes apparent they're not necessary, then they wouldn't be deposed, correct. We'll produce them -- assuming that the cutoff and nothing else has changed, we will

produce them before the end of the (ui).

MR. FIOCCOLA: Your Honor, I think there might be a little confusion here. We would like to depose them within the next -- by late September, by mid-October and get something schedule because we have to work on the schedule to find when these plaintiffs will be available. We have to determine where they would like to be deposed. There also might be followup discovery on our part based on what we learn from the depositions. So plaintiffs just want to wait until the end, which is going to be really problematic about scheduling, and we don't want to have to come back --

THE COURT: You wanted them to be produced two months before the end of discovery, right? Two months before the end of discovery as of now would be basically the end of October.

MR. WITTELS: Judge, September and October are -- we're going to be doing a lot with these motions.

THE COURT: Do them in November.

MR. WITTELS: Can we do them before the end of November? You'll get them before the end of November.

MR. PREVIN: Judge, there are five --

MR. FIOCCOLA: There are only five

individuals, your Honor.

MR. PREVIN: If there are only five individuals, we'd prefer not to wait until Thanksgiving and running into the holidays at the end of the year to depose these individuals when we can do it now

MR. WITTEL: It's not running into the holidays. Your Honor made the point that if the class motion is granted, we won't know them. I know they think they're going to discover some smoking gun from the plaintiffs. It hasn't happened yet. Again, to keep beating the Ground Hog Day, they know the story. They've got the phone calls. If they don't have the phone calls, they have the logs, they have the documents. They're not learning anything new.

THE COURT: The same thing could be said for you getting more phone calls. You've heard the story a million times. You know what the phone calls are going to say. There's a reason why you want those, there's a reason why they want to depose your plaintiffs. They may get the exact same story and it will be a waste of their time but they're entitled to do it.

MR. WITTELS: Judge, if we could do it --

THE COURT: I don't think we should be fighting about a one-month difference between whether you do it in October or you do it in November.

MR. McINTURFF: We have a lot of things on the calendar already in September and October so we're --

THE COURT: Work it out with defendants as to when --

MR. WITTELS: If we could have until November 17th, we'll get them done by then.

MR. PREVIN: We'll have them done before November 17th?

MR. WITTELS: Yeah, you'll get the people by November 17th.

MR. PREVIN: You mean the dates will be before November 17th.

MR. WITTELS: Yes.

MR. PREVIN: We'll notice the depositions and works out the dates. If we run into an issue, Judge, we'll let you know.

THE COURT: Okay. If you can't figure out the dates, let me know.

MR. FIOCCOLA: We'll work out dates. They're technically already noticed.

MR. WITTELS: Judge, do you have a date for us to come back?

THE COURT: Yes.

MR. WITTELS: In October? Subject to the

defendants and your Honor, maybe the 19th of October. Does that work for you guys?

THE COURT: I'm sorry, what date were you looking for?

MR. WITTELS: The 19th.

THE COURT: Let me take a quick look. That week is not good for me because I'm on criminal duty, so it would have to be the week after.

MR. PREVIN: The 26th, your Honor?

THE COURT: The 26th is a good day for me.

MR. PREVIN: Judge, maybe we should work out a briefing schedule to make sure that --

THE COURT: How is the 27th?

MR. FIOCCOLA: I was going to ask if the 27th was better. Friday would be better for me.

MR. WITTELS: Let me just check.

THE COURT: Take your time.

MR. WITTELS: Judge, we'd like to keep the 2th that you suggested and then have another date because I don't know if we're going to make the motion by then and it is hard to get dates. We'll have other discovery issues by then, if not other motions. Then we're probably going to have to have -- defendants will need a fair amount of time to respond to the sanctions motion.

THE COURT: All right.

MR. WITTELS: We'd suggest two weeks later, so maybe the 10th, the 27th and the 10th.

THE COURT: What time do you want to do on the 27th?

MR. WITTELS: That's a Friday. I'm thinking maybe late morning.

MR. OFAK: Your Honor, this time works well for us because we're traveling from D.C., the 2:00 p.m. time period.

MR. WITTELS: Can you do any earlier?

MR. OFAK: We could do earlier, 1:00. If we get the 11:00, we could probably make it, but when we get earlier than that --

THE COURT: 1:00? Does that work?

MR. OFAK: That's fine.

MR. WITTELS: So October 27th at 1:00 and then what about the 10th?

MR. FIOCCOLA: November 10th?

MR. WITTELS: Yes.

MR. FIOCCOLA: And that's the hearing on the motion?

MR. WITTELS: Hopefully.

MR. FIOCCOLA: That's Veterans Day.

MR. PREVIN: I can't do the 10th. If this is

just a hearing on the sanctions motion, then my involvement isn't necessary.

THE COURT: It doesn't matter. The courthouse is closed that day.

MR. WITTELS: What about the 13th, November 13th?

THE COURT: The only problem with the 13th is it's a jury return day. At this point, I don't have anything but it's very likely I could get assigned a jury selection for that day.

MR. WITTELS: The 14th?

THE COURT: I could do the 14th.

MR. WITTELS: 1:00?

THE COURT: Actually, I can't do 1:00 that day. Can you do 2:00?

MR. WITTELS: Sure.

MR. TEPFER: Working backwards from that, when do you want to file your motion?

MR. McINTURFF: We're going to figure it out. We'll let you know in the next few days.

MR. TEPFER: We're going to request thirty days to respond, which is standard for a sanctions motion. So just factor that in and then I assume you want to reply in time for the Court to review everything before the 14th.

MR. PREVIN: Is the 14th specifically a hearing on the sanctions motion?

THE COURT: It is. So if you can't get the briefing done in time for that, I'll just have to move that hearing.

MR. PREVIN: I just want to know whether I need to -- someone on behalf of Ocwen will attend but it may not be me if that's the only --

THE COURT: Okay.

MR. PREVIN: Thank you.

THE COURT: At this point anyway, that's what it's for. Something tells me that will be the only thing we will have time to discuss that day.

MR. FIOCCOLA: If we don't have anything else, your Honor, I've got to relieve my nanny and I have a three-and-a-half-hour commute home.

THE COURT: I thought my two-hour commute home was bad.

MR. TEPFER: Are we waiting for a date from you when you're going to file your motion?

MR. McINTURFF: No, we'll get to you.

MR. TEPFER: As long as we have our thirty days, I think that's fine, from whenever you're going to file it.

THE COURT: Is there anything else that the

parties wish to discuss while we're here? You've got seven minutes for us to make 5:00. I'm just joking with you. I can't remember the last time we actually finished before 5:00.

MR. FIOCCOLA: I was going to say this is early for us.

MR. WITTELS: We can have ex parte settlement talks.

THE COURT: I'm always up for ex parte settlement talks but not at 5:00.

MR. WITTELS: Thank you, Judge.

THE COURT: Talk to everyone soon.

* * * * * * * * *

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

ELIZABETH BARRON September 1, 2017